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CRIMINAL LAW

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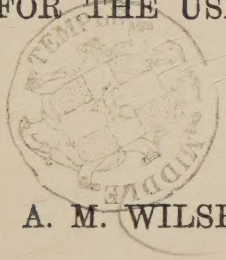

BY

A. M. WILSHERE, M.A., LL.B.

BEING A COMPANION VOLUME TO

"THE ELEMENTS OF CRIMINAL LAW AND PROCEDURE"

BY THE SAME AUTHOR

LONDON

SWEET AND MAXWELL, LIMITED

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1912

PREFACE

THIS very small volume of cases illustrating the principles of the Criminal Law is published merely as a companion to my "Elements of Criminal Law and Procedure." The selection and arrangement of the cases is not, therefore, the same as it would have been in an entirely independent publication. Evidence has been so well dealt with in Mr. E. Cockle's "Leading Cases on Evidence" that I have not included any cases on this subject.

A. M. W.

1 ELM COURT, TEMPLE.
March 1911.

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LEADING CASES
IN
CRIMINAL LAW

CATTELL v. IRESON
(1858).
E. B. & E. 97; 27 L. J. M. C. 167.

By s. 23 of the Game Act, 1831, it was provided that any person using any instrument or engine for the purpose of taking game, not being authorized by certificate, should be liable to a fine of £5 for every such offence. By s. 38, in default of payment of a fine the person convicted might be imprisoned. *Held*, that an information under the statute was a criminal proceeding in which the offender was charged with the commission of an offence punishable on summary conviction.

Lord Campbell, C.J.—"**It is our business not to estimate the degree of moral guilt involved in the act . . . but to see how such act is treated by the Legislature.** I see that the Legislature has . . . made the act a crime, **punishable** by fine or imprisonment. It is not like the case of . . . a fiscal proceeding, nor like a proceeding for a civil right, nor like a proceeding before a magistrate for a wrong done to the party applying. I do not proceed on the ground that section 23 uses the word "offence," but on the ground that it treats the act as an offence. That being so, was not this proceeding instituted for an act punishable on summary conviction, to punish a person who had violated the statute and was punishable for that? I cannot be bound by any opinion I may form of the morality of that act; but I must see

what it is that the Legislature has chosen to punish. Now I am clearly of opinion that that which section 23 forbids is treated by the Legislature as a crime; and **the enactment has in view the punishment of the offender.**"

CROMPTON, S.—"It seems to me that this is clearly an offence **punishable** by a summary proceeding under the Act and of a criminal nature. The first circumstance which I remark is that the act is punishable by a fine according to the magnitude of the offence, and if the fine is not paid the punishment falls upon the person, to an extent, I presume, equivalent to a fine. My brother Hayes says that the imprisonment is only by way of punishment for the failure to pay. I think that is not so, but that the effect of the enactment is that, if the party convicted cannot pay, an imprisonment is to be awarded adequate to the offence."

THE MIDLAND INSURANCE COMPANY v. SMITH

(1881).

6 Q. B. D. 561; 50 L. J. Q. B. 329.

An insurance company granted a fire policy to S., whose wife feloniously burnt the property insured. The company brought an action against S. and his wife for the damage done by the act of the wife. *Held*, that the fact that the wife had not been prosecuted would not prevent the action from being maintained if it was in other respects maintainable.

WATKIN WILLIAMS, J.—The second point raised by the demurrer, namely, that an action cannot be maintained to recover damages for a wrongful act amounting to a felony, unless the public right has been first vindicated by a prosecution of the felon, has in the present view of the case ceased to be material, but . . . I think it better not to pass the point over wholly unnoticed.

The history of the question shews that it has at different times and by different authorities been resolved in three distinct ways. First, it has been considered that the private wrong and injury has been entirely merged and drowned in the public wrong, and therefore no cause of action ever arose or could arise. Secondly, it was thought that, although there was no actual merger, it was a condition precedent to the accruing of the cause of action that the public

right should have been vindicated by the prosecution of the felon. Thirdly, it has been said that the true principle of the common law is that there is neither a merger of the civil right nor is it a strict condition precedent to such right that there shall have been a prosecution of the felon, but that there is a duty imposed upon the injured person, not to resort to the prosecution of his private suit to the neglect and exclusion of the vindication of the public law. In my opinion this last view is the correct one. . . .

. . . The rule is founded on public policy which "requires that offenders against the law shall be brought to justice, and for that reason a man is not permitted to abstain from prosecuting an offender by receiving back stolen property or any equivalent or composition for a felony without suit, and of course cannot be allowed to maintain a suit for such a purpose." (*a*)

In 1845 the case of *White* v. *Spettigue* (*b*) was tried before Lord Cranworth. This was an action of trover brought by a solicitor against a bookseller, who had innocently purchased, and afterwards sold, certain books which had been stolen from the plaintiff. The learned judge told the jury that there was no evidence to shew who stole the books, and the property in the goods, being originally in the plaintiff, could not be taken out of him by any act of a third party, and he directed them to find for the plaintiff, unless they believed the defendant received them knowing them to have been stolen, in which case the right would then merge in the felony, and the plaintiff would not be entitled to recover. The jury having found for the plaintiff the defendant moved for a new trial on the ground of misdirection . . .; and Lord Cranworth . . . said: "I think the true principle is, that **where a criminal, and consequently an injurious act towards the public has been committed, which is also a civil injury to a party, that party shall not be permitted to seek redress for the civil injury to the prejudice of public justice,** and to waive the felony and go for the conversion." . . .

. . . The question arose again in a very similar form in the case of *Wells* v. *Abrahams* (*c*) in 1872. This was an action of trover for a brooch; pleas, not guilty and not possessed; at the

(*a*) *Stone* v. *Marsh*, 6 B. & C. 551. (*b*) 13 M. & W. 603.
(*c*) L. R. 7 Q. B. 554.

trial before Lush, J., the evidence shewed a felonious taking; after a verdict for the plaintiff, the defendant having obtained a rule *nisi* for a new trial upon the ground that the act complained of proved to be a felony, and therefore that the action would not lie, this rule was discharged upon the ground that the judge, as a mere commissioner of *nisi prius*, could only try the issues joined, and had no power to direct a verdict for the defendant against positive and affirmative evidence in favour of the plaintiff. Cockburn, C.J., said: "No doubt it has been long established as the law of England that where an injury amounts to an infringement of the civil rights of an individual, and at the same time to a felonious wrong, the civil remedy, that is, the right of redress by action, is suspended until the party inflicting the injury has been prosecuted. But although this is the rule, it becomes a different question when we have to consider how it is to be enforced. It may be that if a person neglecting his duty to prosecute for an offence committed against him were to bring an action instead of prosecuting, the Court might be called upon to intervene and to prevent the plaintiff obtaining by judgment and execution the fruits of the action thus improperly brought." Lord Blackburn was of the same opinion and said: "While the law throws the prosecution of criminal offences on private individuals, it may be in some cases that the civil remedy is suspended until there has been a prosecution for the felony. If an action were brought against a defendant, and it was stated by the Attorney-General on behalf of the Crown that criminal proceedings were pending, and the action was brought with an intention of compromising the felony, the Court might in the exercise of its summary jurisdiction stay proceedings in the action until the indictment for felony had been tried." His Lordship after reviewing the authorities expressed his disapproval of the nonsuit in *Wellock* v. *Constantine*, (*d*) and stated that that case could not be treated as an authority. Lush, J., assented, upon the ground that the judge at *nisi prius* could only try the issues joined, and that it was not competent to him to interpose and stop the case in manner suggested; that if the declaration disclosed that which made it bad on demurrers or in arrest of judgment, that would not justify the judge at the trial in stopping

(*d*) 2 H. & C. 456.

the case. This case, although it actually decided no more than that a judge of *nisi prius* had no power to do more than decide the issues joined upon the record, tended strongly in the direction of proving that practically a civil action for damages might be maintained for a wrongful act amounting to a felony. The defendant could not plead his felony, the judge could only try the issues raised upon the pleadings, and there is no instance on record of the Attorney-General or the Crown having interposed to stop the action. This position of the question is somewhat altered by the Judicature Act. The judge of *nisi prius* is no longer a mere commissioner to try issues; but by that Act (36 & 37 Vict. c. 66, s. 29) every judge acting under the ordinary commissions constitutes a Court of the High Court of Justice. . . .

. . . The question in the present case arises upon demurrer to the statement of claim, by which all that appears is that the plaintiffs are suing for damages for an injury caused by the felonious act of the defendant; the only question, therefore, is, whether such an action is *primâ facie* maintainable, or whether upon the face of the claim it ought to be finally and conclusively rejected. In my judgment, upon this demurrer, the action may be maintainable in fact. **There is nothing to shew whether the plaintiffs have or have not neglected to prosecute the felon;** and it is consistent with this demurrer that the felon may in fact have been convicted; and as it seems clear to me that the prosecution of the felon is not an absolute condition precedent to the accruing of the cause of action, the statement of claim is *primâ facie* sufficient, so far as the present point is concerned. But as in my opinion the action is upon the first ground not sustainable, the judgment upon this demurrer must be for the defendants.

SHERRAS v. DE RUTZEN

(1895).

[1895] 1 Q. B. 918; 64 L. J. M. C. 218.

By s. 16 of the Licensing Act, 1872, it was provided that any person who "supplies any liquor . . . to any constable on duty . . . shall be liable to a penalty."[1] A police constable on duty was served by the appellant's daughter in his presence. Neither the appellant nor his

daughter made any inquiry whether he was on duty, but they had wrongly assumed that he was off duty owing to the fact that he had before entering the house removed the armlet which police constables wear when on duty. The appellant was convicted before a police magistrate and the Court of Quarter Sessions upheld the conviction. *Held*, on appeal, that, as the appellant had acted in a *bonâ fide* belief that the constable was off duty, the conviction must be quashed.

WRIGHT, J.—There are many cases on the subject, and it is not very easy to reconcile them. There is a presumption that *mens rea*, an evil intention, or a knowledge of the wrongfulness of the act, is an essential ingredient in every offence; but that presumption is liable to be displaced either by the words of the statute creating the offence or by the subject matter with which it deals, and both must be considered: *Nicholls* v. *Hall.* (*a*) . . .

. . . Apart from isolated and extreme cases . . . the principal classes of exceptions may perhaps be reduced to three. One is a class of acts which in the language of Lush, J., in *Davies* v. *Harvey*, (*b*) are not criminal in any real sense, but are acts which in the public interest are prohibited under a penalty. Several such instances are to be found in the decisions on the Revenue Statutes, e.g. *Attorney-General* v. *Lockwood*, (*c*) where the innocent possession of liquorice by a beer retailer was held an offence. So under the Adulteration Acts: *R.* v. *Woodrow*, (*d*) as to innocent possession of adulterated tobacco; *Fitzpatrick* v. *Kelly* (*e*) and *Roberts* v. *Egerton*, (*f*) as to the sale of adulterated food. So under the Game Acts, as to the innocent possession of game by a carrier: *R.* v. *Marsh.* (*g*) So as to the liability of a guardian of the poor whose partner, unknown to him, supplied goods for the poor: *Davies* v. *Harvey.* (*h*) To the same head may be referred *R.* v. *Bishop*, (*i*) where a person was held rightly convicted of receiving lunatics in an unlicensed house, although the jury found that he honestly and on reasonable grounds believed that they were not lunatics. Another class comprehends some, and perhaps all, public nuisances: *R.* v. *Stephens*, (*k*) where the employer was held liable on indictment for a nuisance caused by

(*a*) L. R. 8 C. P. 322. (*b*) L. R. 9 Q. B. 433. (*c*) 9 M. & W. 378.
(*d*) 15 M. & W. 404. (*e*) L. R. 8 Q. B. 337. (*f*) L. R. 9 Q. B. 494.
(*g*) 2 B. & C. 717. (*h*) L. R. 9 Q. B. 433. (*i*) 5 Q. B. D. 259.
(*k*) L. R. 1 Q. B. 702.

workmen without his knowledge and contrary to his orders; and so in *R.* v. *Medley* (*l*) and *Barnes* v. *Akroyd.* (*m*) Lastly, there may be cases in which, although the proceeding is criminal in form, it is really only a summary mode of enforcing a civil right: see *per* Williams and Willes, JJ., in *Morden* v. *Porter*, (*n*) as to unintentional trespass in pursuit of game; *Lee* v. *Simpson*, (*o*) as to unconscious dramatic piracy; and *Hargreaves* v. *Diddams*, (*p*) as to a *bonâ fide* belief in a legally impossible right to fish. But, except in such cases as these, there must in general be guilty knowledge on the part of the defendant, or of some one whom he has put in his place to act for him, generally, or in the particular matter, in order to an offence. **It is plain that if guilty knowledge is not necessary, no care on the part of the publican could save him from a conviction under s. 16, sub.-s. 2,** since it would be as easy for the constable to deny that he was on duty when asked, or to produce a forged permission from his superior officer, as to remove his armlet before entering the public-house.

McNAGHTEN'S CASE

(1843).

10 Cl. & Fin. 200.

Daniel McNaghten having been indicted and found 'not guilty' on the ground of insanity the verdict and the nature and extent of the unsoundness of mind which would excuse a felony of this sort became the subject of debate in the House of Lords, and it was determined to take the opinion of the judges on the law governing such cases. Accordingly certain questions of law were propounded to them, in answer to which all the judges with the exception of Mr. Justice Maule concurred in the following reply.

The first question proposed by your Lordships is this:

"What is the law respecting alleged crimes committed by persons afflicted with insane delusion in respect of one or more particular subjects or persons: as, for instance, where at the time of the commission of the alleged crime the accused knew he was acting contrary to law, but did the act complained of with a view, under the

(*l*) 6 C. & P. 292. (*m*) L. R. 7 Q. B. 474. (*n*) 7 C. B. N. S. 641.
(*o*) 3 C. B. 871. (*p*) L. R. 10 Q. B. 582.

influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some supposed public benefit?"

In answer to which question, assuming that your Lordships' inquiries are confined to those persons who labour under such partial delusions only, and are not in other respects insane, we are of opinion that, notwithstanding the party accused did the act complained of with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some public benefit, he is nevertheless punishable according to the nature of the crime committed, **if he knew at the time of committing such crime that he was acting contrary to law: by which expression we understand your Lordships to mean the law of the land.**

Your Lordships are pleased to inquire of us, secondly, "What are the proper questions to be submitted to the jury, where a person alleged to be afflicted with insane delusion respecting one or more particular subjects or persons is charged with the commission of a crime (murder, for example) and insanity is set up as a defence?" And, thirdly, "In what terms ought the question to be left to the jury as to the prisoner's state of mind at the time when the act was committed?" And as these two questions appear to us to be more conveniently answered together, we have to submit our opinion to be, that the jurors ought to be told in all cases that **every man is to be presumed to be sane,** and to possess a sufficient degree of reason to be responsible for his crimes, **until the contrary be proved** to their satisfaction; and that **to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong.** The mode of putting the latter part of the question to the jury on these occasions has generally been, whether the accused at the time of doing the act knew the difference between right and wrong: which mode, though rarely, if ever, leading to any mistake with the jury, is not, as we conceive, so accurate when put generally and in the abstract, as when put **with reference to the party's knowledge of right and wrong**

in respect to the very act with which he is charged. If the question were to be put as to the knowledge of the accused solely and exclusively with reference to the law of the land, it might tend to confound the jury, by inducing them to believe that an actual knowledge of the law of the land was essential in order to lead to a conviction; whereas the law is administered upon the principle that everyone must be taken conclusively to know it, without proof that he does know it. If the accused was conscious that the act was one which he ought not to do, and if that act was at the same time contrary to the law of the land he is punishable; and the usual course, therefore, has been to leave the question to the jury whether the party accused had a sufficient degree of reason to know that he was doing an act that was wrong: and this course we think is correct accompanied with such observations and explanations as the circumstances of each particular case may require.

The fourth question which your Lordships have proposed to us is this: "If a person, under an insane delusion as to existing facts, commits an offence in consequence thereof, is he thereby excused?" To which question the answer must of course depend on the nature of the delusion; but, making the same assumption as we did before, namely, that he labours under such **partial delusion** only, and is nôt in other respects insane, we think **he must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real.** For example, if, under the influence of his delusion he supposes another man to be in the act of attempting to take away his life, and he kills that man, as he supposes, in self-defence, he would be exempt from punishment. If his delusion was that the deceased had inflicted a serious injury to his character and fortune, and he killed him in revenge for such supposed injury, he would be liable to punishment.

The question lastly proposed by your Lordships is: "Can a medical man conversant with the disease of insanity, who never saw the prisoner previously to the trial, but who was present during the whole trial and examination of all the witnesses, be asked his opinion as to the state of the prisoner's mind at the time of the commission of the alleged crime? or his opinion whether the prisoner was conscious at the time of doing the act that he was acting

contrary to law, or whether he was labouring under any and what delusions at the time ? " In answer thereto, we state to your Lordships that we think the medical man under the circumstances supposed cannot in strictness be asked his opinion in the terms above stated, because each of those questions involves the determination of the truth of the facts deposed to, which it is for the jury to decide, and the questions are not mere questions upon a matter of science, in which case such evidence is admissible. But where the facts are admitted or not disputed, and the question becomes substantially one of science only, it may be convenient to allow the question to be put in that general form, though the same cannot be insisted on as a matter of right.

R. v. MEADE

(1909).

[1909] 1 K. B. 895 ; 78 L. J. K. B. 476.

Where a man is so drunk as to be incapable of knowing the natural consequences of his acts it follows that he is incapable of *intending* those consequences.

Darling, J.—In this case the question to be decided arises out of certain words used by Lord Coleridge, J., in summing up to the jury. Complaint is made as to certain words used by him in leaving to the jury considerations applicable to the case of a man who, being drunk at the time, has done acts which result in the death of another, with whose murder he is charged. I will deal with these words presently ; but it is necessary before doing so to deal with the history of the doctrine of the effect of drunkenness upon a charge of a crime such as murder, where the question of intent is involved. Originally the law was that although an insane person was not liable to the same consequences and ought not to be judged by the same standard as a sane one, yet, if he was suffering from *dementia affectata*, that is, a temporary insanity caused by the accused's own voluntary act in getting drunk, then drunkenness was no excuse for crime : I Hawkins' Pleas of the Crown, c. 1, s. 6, where it is said, " And he who is guilty of any crime whatever through his voluntary drunken-

ness shall be punished for it as much as if he had been sober." The law stood as thus expressed for many years, and, as far as we know, the point was first decided in a contrary sense in *R.* v. *Grindley*, (*a*) decided in the year 1819. Since then there have been many decisions in which judges have attempted to express the doctrine that where intent is of the essence of a crime with which a person is charged, that intent may be disproved by shewing that at the time of the commission of the act charged the prisoner was in a state of drunkenness, in which state he was incapable of forming the intent. Different judges have expressed themselves differently, but not so differently as to be irreconcilable and to prevent the Court from saying that they were expressing the same doctrine. The two authorities which bear most upon the point are *R.* v. *Monkhouse* (*b*) and *R.* v. *Doherty*, (*c*) the first decided by Coleridge, J., and the second by Stephen, J., and no doubt identical expressions were not used in each. But it is necessary to repeat what has often been said before in this Court, namely, that when a judge sums up to a jury he must not be taken to be inditing a treatise on the law. He addresses himself to the particular facts of the case then before the jury, and no judge can affect, in those circumstances, to give an exhaustive definition, or one which applies to every conceivable case. It is enough if he gives a sufficient definition, and rightly directs the attention of the jury to the facts of the case before them. That is true of the present case. I have stated what the ancient view was, and that it is not now in accordance with the law. We do not consider it any part of our duty to enlarge the rule of law or to use language wider than that used by the judges who had considered the question before, for it is not our duty to say anything which will confer an immunity greater than that which they already enjoy on persons who have voluntarily made themselves drunk. On behalf of the prisoner it was said that the words used by Lord Coleridge, J., would induce the jury to suppose that unless they found the appellant insane they would not be justified in finding him guilty of manslaughter. But he had expressly told the jury that there was no plea of insanity. That was sufficient to warn the jury not to make

(*a*) 1 *Russ. on Crimes* (6th ed.), 144. (*b*) 4 Cox C. C. 55.
(*c*) 16 Cox C. C. 306.

such a mistake. The appellant brutally ill-treated the deceased woman during a great part of the night on which she died; he said that he would give her a good hiding, and he broke a broomstick over her. He struck her a blow on the top of the nose, and, as she fell towards him, gave her a violent blow with his fist on the lower part of the body, which ruptured an intestine, and she died during the night. If he did do this and she died of the injury, and he intended to inflict serious bodily injury on her, he was guilty of murder. It was contended at the trial that the presumption that the prisoner had this intent was rebutted because he, by reason of drunkenness, had no such intent. It then became the duty of Lord Coleridge, J., to lay down the rule as to the nature of the drunkenness which would be sufficient to satisfy them that the prisoner had not that intent. **We desire to state the rule in the following terms: A man is taken to intend the natural consequences of his acts. This presumption may be rebutted—(1) in the case of a sober man in many ways: (2) it may also be rebutted in the case of a man who is drunk, by shewing his mind to have been so affected by the drink he had taken that he was incapable of knowing that what he was doing was dangerous, i.e., likely to inflict serious injury. If this be proved, the presumption that he intended to do grievous bodily harm is rebutted.**

In our opinion this doctrine was not expressed by Lord Coleridge, J., in such a way as to mislead the jury into thinking that insanity must be proved. We have carefully considered the words used by him. We have been unable to trace some of them to the language used previously by judges. But a judge is not condemned to use no words which are not commonplace. It is said that some of the language used by Lord Coleridge, J., is picturesque and figurative. No doubt; but it is quite easy to say in picturesque and figurative language that which is true. We cannot say that the language of Lord Coleridge, J., differs in its meaning from the rule we have just laid down. It is unnecessary to criticize the very words used. Unless we think them misleading and calculated to lead the jury to think that something equivalent to absolute insanity must be proved to entitle them to bring in a verdict of manslaughter, this appeal ought to be dismissed. After having carefully considered the

authorities and the language used by Lord Coleridge, J., we have come to the conclusion that there is nothing in the words used by him which is contrary to the rule we have laid down or to former decisions, and that the appeal ought therefore to be dismissed.

R. v. TOLSON

(1889).

23 Q. B. D. 168; 58 L. J. M. C. 97.

A. married T. in September 1880. In November 1881 T. deserted her and as a result of her inquiries she believed that he had been lost in a vessel which went down with all hands on board. In January 1887 A., believing herself to be a widow, went through the ceremony of marriage with Y. The circumstances were known to Y. and there was no concealment of the ceremony. *Held*, that A. could not be convicted, under s. 57 of the Offences against the Person Act, 1861, of bigamy.

STEPHEN, J.—My view of the subject is based upon a particular application of the doctrine usually, though I think not happily, described by the phrase, *non est reus, nisi mens sit rea.* Though this phrase is in common use, I think it most unfortunate, and not only likely to mislead, but actually misleading, on the following grounds. It naturally suggests that, apart from all particular definitions of crimes, such a thing exists as a *mens rea* or "guilty mind," which is always expressly or by implication involved in every definition. This is obviously not the case, for **the mental elements of different crimes differ widely.** *Mens rea* means in the case of murder, malice aforethought; in the case of theft, an intention to steal; in the case of rape, an intention to have forcible connection with a woman without her consent; and in the case of receiving stolen goods, knowledge that the goods were stolen. In some cases it denotes mere inattention. For instance, in the case of manslaughter by negligence it may mean forgetting to notice a signal. It appears confusing to call so many dissimilar states of mind by one name. It seems contradictory indeed to describe a mere absence of mind as *mens rea* or guilty mind. The expression again is likely to and often does mislead. To an unlegal mind it suggests that by the law of England no act is a crime which is

done from laudable motives, in other words, that immorality is essential to crime . . .

. . . The principle involved appears to me, when fully considered, to amount to no more than this. The full definition of every crime contains expressly or by implication a proposition as to a state of mind. Therefore, if the mental element of any conduct alleged to be a crime is proved to have been absent in any given case, the crime so defined is not committed; or, again, if a crime is fully defined, nothing amounts to that crime which does not satisfy that definition.

Crimes are in the present day much more accurately defined by statute or otherwise than they formerly were. The mental element of most crimes is marked by one of the words "maliciously," "fraudulently," "negligently," or "knowingly," but it is the general —I might, I think, say, the invariable—practice of the legislature to leave unexpressed some of the mental elements of crime. In all cases whatever competent age, sanity, and some degree of freedom from some kinds of coercion are assumed to be essential to criminality, but I do not believe they are ever introduced into any statute by which any particular crime is defined.

The meaning of the words "malice," "negligence," and "fraud" in relation to particular crimes has been ascertained by numerous cases. Malice means one thing in relation to murder, another in relation to the Malicious Mischief Act, and a third in relation to libel, and so of fraud and negligence.

With regard to knowledge of fact, the law perhaps is not quite so clear, but it may, I think, be maintained that in every case knowledge of fact is to some extent an element of criminality as much as competent age and sanity. To take an extreme illustration, can anyone doubt that a man who, though he might be perfectly sane, committed what would otherwise be a crime in a state of somnambulism, would be entitled to be acquitted? And why is this? Simply because he would not know what he was doing. A multitude of illustrations of the same sort might be given. I will mention one or two glaring ones. *Levet's Case* (*a*) decides that a man who, making a thrust with a sword at a place where,

(*a*) 1 Hale 474.

upon reasonable grounds, he supposed a burglar to be, killed a person who was not a burglar, was held not to be a felon, though he might be (it was not decided that he was) guilty of killing *per infortunium*, or possibly *se defendendo*, which then involved certain forfeitures. In other words, he was in the same situation as far as regarded the homicide as if he had killed a burglar. In the decision of the judges in *Macnaghten's Case* (*b*) it is stated that if under an insane delusion one man killed another, and if the delusion was such that it would, if true, justify or excuse the killing, the homicide would be justified or excused. This could hardly be if the same were not law as to a sane mistake. A *bonâ fide* claim of right excuses larceny and many of the offences against the Malicious Mischief Act. Apart, indeed, from the present case, I think it may be laid down as a general rule that an alleged offender is deemed to have acted under that state of facts which he in good faith and on reasonable grounds believed to exist when he did the act alleged to be an offence.

WILLS, J.—Although *primâ facie* and as a general rule there must be a mind at fault before there can be a crime, it is not an inflexible rule, and a statute may relate to such a subject-matter and may be so framed as to make an act criminal whether there has been any intention to break the law or otherwise to do wrong or not. There is a large body of municipal law in the present day which is so conceived. Bye-laws are constantly made regulating the width of thoroughfares, the height of buildings, the thickness of walls, and a variety of other matters necessary for the general welfare, health, or convenience, and such bye-laws are enforced by the sanction of penalties, and the breach of them constitutes an offence and is a criminal matter. In such cases it would, generally speaking, be no answer to proceedings for infringement of the bye-law that the person committing it had *bonâ fide* made an accidental miscalculation or an erroneous measurement. The Acts are properly construed as imposing the penalty when the act is done, no matter how innocently, and in such a case the substance of the enactment is that a man shall take care that the statutory direction is obeyed, and that if he fails to do so he does it at his

(*b*) *Ante*, p. 7.

peril. Whether an enactment is to be construed in this sense or with the qualification ordinarily imported into the construction of criminal statutes, that there must be a guilty mind, must, I think, depend upon the subject-matter of the enactment, and the various circumstances that may make the one construction or the other—reasonable or unreasonable. . . . Again the nature and extent of the penalty attached to the offence may reasonably be considered. There is nothing that need shock any mind in the payment of a small pecuniary penalty by a person who has unwittingly done something detrimental to the public interest. To subject him, when what he has done has been nothing but what any well-disposed man would have been likely to do under the circumstances, to the forfeiture of all his goods and chattels, which would have been one consequence of a conviction at the date of the Act 24 & 25 Vict., to the loss of civil rights, to imprisonment with hard labour or even to penal servitude, is a very different matter; and such a fate seems properly reserved for those who have transgressed morally as well as unintentionally done something prohibited by law.

R. v. PRINCE

(1875).

L. R. 2 C. C. R. 154; 44 L. J. M. C. 122.

A. was convicted under s. 55 of the Offences against the Person Act, 1861, of "unlawfully" taking an unmarried girl under the age of sixteen out of the possession and against the will of her father. *Held*, that it was no defence that A. *bonâ fide* believed and had reasonable ground for believing that the girl was over sixteen.

DENMAN, J.—I agree in the judgment of my Brothers Bramwell and Blackburn, and I wish what I add to be understood as supplementary to them. The defendant was indicted under the 24 & 25 Vict. c. 100, s. 55, which enacts that "whosoever shall *unlawfully* take or cause to be taken, any unmarried girl, being under the age of sixteen years, out of the possession and against the wish of her father or mother, or of any other person having the lawful care or charge of her, shall be guilty of a misdemeanour."

I cannot hold that the word "unlawfully" is an immaterial word in an indictment framed upon this clause. I think it must be taken to have a meaning, and an important meaning, and to be capable of being either supported or negatived by evidence upon the trial: see *R.* v. *Turner*, (*a*) *R.* v. *Ryan*. (*b*)

In the present case the jury found that the defendant had done everything required to bring himself within the clause as a misdemeanant, unless the fact that he *bonâ fide* and reasonably believed the girl taken by him to be eighteen years old constituted a defence. That is in other words, unless such *bonâ fide* and reasonable belief prevented them from saying that the defendant in what he did acted "unlawfully" within the meaning of the clause. The question, therefore, is whether, upon this finding of the jury, the defendant did unlawfully do the things which they found him to have done.

The solution of this question depends upon the meaning of the word "unlawfully" in s. 55. If it means "with a knowledge or belief that every single thing mentioned in the section existed at the moment of the taking," undoubtedly the defendant would be entitled to an acquittal, because he did not believe that a girl of under sixteen was being taken by him at all. If it only means "without lawful excuse" or justification, then a further question arises, viz. whether the defendant had any lawful excuse or justification for doing all the acts mentioned in the clause as constituting the offence, by reason, merely, that he had *bonâ fide* and reasonably believed the girl to be older than the age limited by the clause. Bearing in mind the previous enactments relating to the abduction of girls under sixteen (4 & 5 Phil. & Mary, c. 8, s. 2), and the general course of the decisions upon those enactments, and upon the present statute, and looking at the mischief intended to be guarded against, it appears to me reasonably clear that the word "unlawfully" in the true sense in which it was used, is fully satisfied by holding that it is equivalent to the words "without lawful excuse," using those words as equivalent to "without such an excuse as being proved would be a complete legal justification for the act, even where all the facts constituting the offence exist."

(*a*) 2 Mood. 41. (*b*) 2 Hawk. c. 25, s. 96.

Cases may easily be suggested where such a defence might be made out, as, for instance, if it were proved that he had the authority of a Court of competent jurisdiction, or of some legal warrant, or that he acted to prevent some illegal violence not justified by the relation of parent and child, or schoolmistress, or other custodian, and requiring forcible interference by way of protection.

In the present case the jury find that the defendant believed the girl to be eighteen years of age; even if she had been of that age, she would have been in the lawful care and charge of her father, as her guardian by nature: see Co. Litt., 88b, n. 12, 19th ed., recognized in *R.* v. *Howes.* (*c*) Her father had a right to her personal custody up to the age of twenty-one, and to appoint a guardian by deed or will, whose right to her personal custody would have extended up to the same age. The belief that she was eighteen would be no justification to the defendant for taking her out of his possession, and against his will. By taking her, even with her own consent, he must at least have been guilty of aiding and abetting her in doing an unlawful act, viz. in escaping against the will of her natural guardian from his lawful care and charge. This, in my opinion, leaves him wholly without lawful excuse or justification for the act he did, even though he believed that the girl was eighteen, and therefore unable to allege that what he has done was not unlawfully done, within the meaning of the clause. In other words, **having knowingly done a wrongful act,** viz. in taking the girl away from the lawful possession of her father against his will and in violation of his rights as guardian by nature, **he cannot be heard to say that he thought the girl was of an age beyond that limited by the statute for the offence charged against him.** He had wrongfully and knowingly violated the father's rights against the father's will. And **he cannot set up a legal defence by merely proving that he thought he was committing a different kind of wrong from that which in fact he was committing.**

(*c*) 3 E. & E. 332.

CUNDY v. LECOCQ

(1884).

13 Q. B. D. 207; 53 L. J. M. C. 125.

The Licensing Act, 1872, provided that "If any licensed person . . . sells any intoxicating liquor to any drunken person, he shall be liable to a penalty. . . ." *Held*, that knowledge of the condition of the person to whom the liquor was sold was not necessary to constitute the offence.

STEPHEN, J.—I am of opinion that this conviction should be affirmed. Our answer to the question put to us turns upon this, whether the words of the section under which the conviction took place, taken in connection with the general scheme of the Act, should be read as constituting an offence only where the licensed person knows or has means of knowing that the person served with intoxicating liquor is drunk, or whether the offence is complete where no such knowledge is shewn. I am of opinion that **the words of the section amount to an absolute prohibition of the sale of liquor to a drunken person, and that the existence of a** *bonâ fide* **mistake as to the condition of the person served is not an answer to the charge,** but is a matter only for mitigation of the penalties that may be imposed. I am led to that conclusion both by the general scope of the Act, which is for the repression of drunkenness, and from a comparison of the various sections under the head "offences against public order." Some of these contain the word "knowingly," as for instance s. 14, which deals with keeping a disorderly house, and s. 16, which deals with the penalty for harbouring a constable. Knowledge in these and other cases is an element in the offence; but the clause we are considering says nothing about the knowledge of the state of the person served. I believe the reason for making this prohibition absolute was that there must be a great temptation to a publican to sell liquor without regard to the sobriety of the customer, and it was thought right to put upon the publican the responsibility of determining whether his customer is sober. Against this view we have had quoted the maxim that in every criminal offence there must be a guilty mind; but I do not think that maxim has so wide an application as it is sometimes considered to have. In old time, and as applicable to the common law or to earlier statutes, the maxim may have been of general application;

but a difference has arisen owing to the greater precision of modern statutes. It is impossible now as illustrated by the cases of *Reg.* v. *Prince* (*a*) and *Reg.* v. *Bishop* (*b*) to apply the maxim generally to all statutes, and the substance of all the reported cases is that **it is necessary to look at the object of each act that is under consideration to see whether and how far knowledge is of the essence of the offence created.** Here, as I have already pointed out, the object of this part of the Act is to prevent the sale of intoxicating liquor to drunken persons, and it is perfectly natural to carry that out by throwing on the publican the responsibility of determining whether the person supplied comes within that category.

CHISHOLM v. DOULTON

(1889).

22 Q. B. D. 736; 58 L. J. M. C. 133.

A., the owner and occupier of buildings used for the purpose of manufacture, was summoned under s. 1 of the Smoke Nuisance (Metropolis) Act, 1853, for negligently using a furnace so that the smoke was not effectually consumed. The smoke arose entirely through the negligence of the stoker. A. had not been personally guilty of any negligence and had taken care to employ an efficient foreman. *Held*, that A. was not personally responsible for the negligence of the stoker.

Cave, J.—It is a general principle of our criminal law that there must be as an essential ingredient in a criminal offence some blameworthy condition of mind. Sometimes it is negligence, sometimes malice, sometimes guilty knowledge—but as a general rule there must be something of that kind which is designated by the expression *mens rea*. Moreover it is a principle of our criminal law that the condition of mind of the servant is not to be imputed to the master. A master is not criminally responsible for a death caused by his servant's negligence, and still less for an offence depending on the servant's malice; nor can a master be held liable for the guilt of his servant in receiving goods knowing them to have been stolen. And this principle of the common law applies also to statutory offences with this difference, that it is in the power of the legislature, if it so

(*a*) L. R. 2 C. C. R. 154. (*b*) 5 Q. B. D. 259.

pleases, to enact, and in some cases it has enacted, that a man may be convicted and punished for an offence although there was no blameworthy condition of mind about him: but inasmuch as to do so is contrary to the general principle of the law, it lies on those who assert that the legislature has so enacted to make it out convincingly by the language of the statute; for we ought not lightly to presume that the legislature intended that A. should be punished for the fault of B.

Now apply those principles to the statute in question. Section 1 enacts that every furnace shall be "constructed or altered so as to consume or burn the smoke arising from such furnace." Then comes the part of the section which affixes penalties for various acts tending to produce the evil against which the legislation is directed. "If any person shall . . . use any furnace which shall not be constructed so as to consume or burn its own smoke." Now there no condition of mind is required as an element in the offence; and we ought to hold with regard to that offence that the owner of the works, although not cognizant that his furnace is incapable of consuming its own smoke, is liable to be convicted if it in fact is so; for it is expressly enacted that if he uses a furnace not properly constructed he shall be liable to the penalty, and he certainly may use it by his servants. Then, passing over the middle clause for a moment, another part of the section enacts that if any person "shall carry on any trade or business which shall occasion any noxious or offensive effluvia, or otherwise annoy the neighbours or inhabitants, without using the best practical means for preventing or counteracting such smoke or other annoyance" he shall be liable. There, again, a *mens rea* is not essential to the commission of the offence, the owner of the premises is absolutely liable if the trade is carried on in such a manner. Now go back to the clause under which the respondent has been summoned, "or shall so negligently use any such furnace as that the smoke arising therefrom shall not be effectually consumed." This differs from the other clauses in that it introduces the word "negligently," a word which imports a blameable condition of mind. If that word were not there, the owner would be responsible for the use of the furnace in such a way that the smoke was not consumed although the use was by his servants and not personally by himself. **But the legislature has chosen to**

make negligence an essential ingredient in this particular offence. And, although the decisions under the Licensing Acts have established that, where a statute has expressly prohibited the doing of something without reference to the condition of mind of the party doing it, it may under certain circumstances, and having regard to the object of the statute, be reasonable to infer that the legislature intended that the master should be responsible if his servant disobeyed the prohibition, yet **so far as I know no statute has ever yet been judicially interpreted as enacting, that where negligence is an essential ingredient in the offence a master is to be responsible for the negligence of his servant.**

COPPEN v. MOORE (No. 2)

(1898).

[1898] 2 Q. B. 306; 67 L. J. Q. B. 689.

By s. 2 (2) of the Merchandise Marks Act, 1887, it is an offence to sell goods to which a false trade description has been applied. A. was a grocer carrying on business at a number of shops to each of which he had sent a notice that hams were to be sold as "breakfast" hams, not as "Bristol," "Scotch," "Wiltshire," or with any similar description. An assistant nevertheless sold an American ham as a Scotch ham. *Held*, that A. was criminally liable for the act of his assistant.

Lord Russell, C.J.—The appellant's contention was that the charge here preferred was a criminal charge, and that the general principle of law applied *Nemo reus est nisi mens sit rea.* There is no doubt that this is the general rule, but it is subject to exceptions, and the question here is whether the present case falls within the rule or within the exception. Apart from statute exceptions have been grafted upon the rule : . . . but by far the greater number of exceptions engrafted upon the general rule are cases in which it has been decided that by various statutes criminal responsibility has been put upon masters for the acts of their servants. Amongst such cases is *Mullins* v. *Collins*, (*a*) where a licensed victualler was convicted of an offence under s. 16 of the Licensing Act, 1872, for supplying liquor to a constable on duty, although this was done by his servant without the knowledge of the master. The decisions

(*a*) L. R. 9 Q. B. 292.

in [this] and in other like cases were based upon the construction of the statute in question. **The Court in fact came to the conclusion that, having regard to the language, scope, and object of those Acts, the legislature intended to fix responsibility upon the master for acts done by his servant in the course of his employment, although such acts were not authorized by the master, and might even have been expressly prohibited by him.**

The question, then, in this case, comes to be narrowed to the simple point, whether upon the true construction of the statute here in question the master was intended to be made criminally responsible for acts done by his servants in contravention of the Act, where such acts were done, as in this case, within the scope or in the course of their employment. In our judgment it was clearly the intention of the Legislature to make the master criminally liable for such acts, unless he was able to rebut the *primâ facie* presumption of guilt by one or other of the methods pointed out in the Act. (*b*)

When the scope and object of the Act are borne in mind, any other conclusion would to a large extent render the Act ineffective for its avowed purposes. The circumstances of the present case afford a convenient illustration of this. The appellant, under the style of the "London Supply Stores," carries on an extensive business as grocer and provision dealer, having, it appears, six shops or branch establishments, and having also a wholesale warehouse. It is obvious that, if sales with false trade descriptions could be carried out in these establishments with impunity so far as the principal is concerned, the Act would to a large extent be nugatory.

R. v. TYLER

(1891).

[1891] 2 Q. B. 588; 61 L. J. M. C. 38.

Liability of a corporation to criminal proceedings.

BOWEN, L.J.—It was first contended on behalf of the appellant that no criminal proceedings can be taken against a company, and

(*b*) By sub-s. 2 (c) the defendant might have successfully met the *primâ facie* case against him by shewing that he had acted innocently, but this defence was not raised.

it becomes necessary, therefore, in order to make the steps of our reasoning clear, that we should examine that proposition and see if there is anything in it. It would seem contrary to sound sense and reason if such a technical objection could succeed. Where, for instance, a statute creates a duty upon individual persons, it would be a strange result if the duty could be evaded by those persons forming themselves into a joint stock company. The point becomes still more incapable of argument where the statute prescribes the duty in the company itself. How can disobedience to the enactment by the company be otherwise dealt with? The directors or officers of the company, who are really responsible for the neglect of the company to comply with the statutory requirements, might not be struck at by the statute, and there would be no way of enforcing the law against a disobedient company, unless there were in such cases a remedy by way of indictment. It may, therefore, I think, be taken that where a duty is imposed upon a company in such a way that a breach of the duty amounts to a disobedience of the law, then, if there is nothing in the statute either expressly or impliedly to the contrary, a breach of the statute is an offence which can be visited upon the company by means of an indictment. That was laid down in *R.* v. *Birmingham and Gloucester Ry. Co.*, (*a*) where Patteson, J., in delivering the judgment of the Court, said that "**as a general proposition . . . a corporation may be indicted for a breach of duty imposed upon it by law, though not for a felony, or for crimes involving personal violence, as for riots or assaults.**" That was a case of nonfeasance; but the same doctrine was applied to cases of misfeasance in *R.* v. *Great North of England Ry. Co.*, (*b*) where Lord Denman, who delivered the judgment of the Court, said: "The argument is that for a wrongful act a corporation is not amenable to an indictment, though for a wrongful omission it undoubtedly is; assuming, in the first place, that there is a plain and obvious distinction between the two species of offence. No assumption can be more unfounded. Many occurrences may be easily conceived, full of annoyance and danger to the public, and involving blame in some individual or some corporation, of which the most acute person could not clearly define the cause, or ascribe them with more

(*a*) 3 Q. B. 323. (*b*) 9 Q. B. 315.

correctness to mere negligence in providing safeguards or to an act rendered improper by nothing but the want of safeguards." And he says that in *R.* v. *Birmingham and Gloucester Ry. Co.*, though a case of nonfeasance only, the Court did not intend to lay down that nonfeasance was the only disobedience to the law for which a corporation was punishable by indictment. The same question was considered incidentally by Cockburn, C.J., in *Pharmaceutical Society* v. *London Supply Association*, (*c*) where he says, "Although it is true that a corporation cannot be indicted for treason or felony, it was established by the case of *R.* v. *Birmingham and Gloucester Ry. Co.* that an incorporated company might be indicted for nonfeasance in omitting to perform a duty imposed by the statute—such as that of making arches to connect lands severed by the defendants' railway. It was further held in *R.* v. *Great North of England Ry. Co.* that an incorporated company could be indicted for misfeasance—as in cutting through and obstructing a highway, though they could not be indicted for treason, or felony, or offences against the person." I take it, therefore, to be clear that in the ordinary case of a duty imposed by statute, if the breach of the statute is a disobedience to the law punishable in the case of a private person by indictment, the offending corporation cannot escape from the consequences which would follow in the case of an individual by shewing that they are a corporation. That seems to me to be common sense and good law.

R. v. LINNEKER

(1906).

[1906] 2 K. B. 99; 72 L. J. K. B. 385.

L. was indicted under s. 18 of the Offences against the Person Act, 1861, for attempting to discharge a loaded revolver at the prosecutor with intent to do him grievous bodily harm. L. had drawn a loaded revolver completely out of his pocket, but his arm had been seized by the prosecutor before he could take any aim. While the prisoner and the prosecutor were struggling the former said several times, "You've got to die." *Held*, that there was evidence of an attempt within s. 18.

KENNEDY, J.—I think that there was sufficient evidence to leave to the jury on the question whether there was an attempt on the part

(*c*) 4 Q. B. D. 313.

of the prisoner to discharge the revolver. It is, however, important to bear in mind that in cases under this section there must be evidence both of an attempt to discharge the weapon and of an intent to do grievous bodily harm, and, **although an attempt implies the intent, an intent does not necessarily imply an attempt.** There may be cases which are very near the line as regards the attempt, although there is no doubt as to the intent. It is always necessary that **the attempt should be evidenced by some overt act forming part of a series of acts which, if not interrupted, would end in the commission of the actual offence.**

DARLING, J.—The statute deals in both s. 14 and s. 18 with two matters which have to be present in every case to constitute the crime. First, there must be evidence of the physical act, the attempt to discharge the firearm. That can be proved by evidence of what the man was doing with his hands, holding a pistol and so on; and if he did these acts which, if not prevented, he would do in order to discharge a pistol, then there is evidence of an attempt. In the case before us the prisoner pulled a loaded revolver out of his pocket and struggled with the prosecutor, attempting to free his arm, which the prosecutor had caught hold of. I think that those facts are evidence of an attempt to discharge the revolver. But the offence under ss. 14 and 18 is not complete unless there was an intent in the one case to murder, and in the other to do grievous bodily harm. In some of the cases there has been a difficulty as to what constitutes **evidence of intent,** but there is none here, because **the prisoner told the prosecutor that he had got to die.**

WALTON, J.—The question is, was there any evidence of an attempt by the prisoner to discharge the revolver? It is clear that **all acts done for the purpose of committing a crime are not attempts, for they may be merely acts of preparation;** but, applying the definition of an attempt given in Stephen's "Digest of the Criminal Law," art. 49, (*a*) I am clearly of opinion that there was in this case evidence of an attempt.

(*a*) "An attempt to commit a crime is an act done with intent to commit that crime, and forming part of a series of acts which would constitute its actual commission if it were not interrupted."

R. v. WHITE
(1910).
[1910] 2 K. B. 124; 79 L. J. K. B. 854.

Mrs. White was found dead in her house; by her side was a glass of lemonade containing cyanide of potassium. She had not, however, died from any poison nor had the lemonade contained enough poison to kill her. The prisoner, her son, had purchased cyanide of potassium, and there was evidence from which a jury could infer that he had put into the lemonade the quantity found there and with intent to murder the deceased. *Held*, that he was properly convicted of an attempt to murder.

BRAY, J.—The next point made was that if he put it there with that intent there was no attempt at murder; that the jury must have acted upon a suggestion of the learned judge in his summing up that this was one, the first or some later, of a series of doses which he intended to administer and so cause her death by slow poisoning; and if they did act on that suggestion there was no attempt at murder, because the act of which he was guilty, namely, the putting the poison in the wine glass, was a completed act and could not be and was not intended by the appellant to have the effect of killing her at once. It could not kill unless it were followed by other acts which he might never have done. There seems no doubt that the learned judge in effect did tell the jury that if this was a case of slow poisoning the appellant would be guilty of the attempt to murder. We are of opinion that this direction was right and that **the completion or attempted completion of one of a series of acts intended by a man to result in killing is an attempt to murder even although this completed act would not, unless followed by the other acts, result in killing. It might be the beginning of the attempt,** but would none the less be an attempt. While saying this we must say also that we do not think it likely the jury acted on this suggestion, because there was nothing to shew that the administration of small doses of cyanide of potassium would have a cumulative effect; we think it much more likely, having regard to the . . . [evidence] . . . that the appellant supposed he had put sufficient poison in the glass to kill her. This, of course, would be an attempt to murder.

R. v. CONEY AND OTHERS

(1882).

8 Q. B. D. 534; 51 L. J. M. C. 66.

Two men had engaged in a prize-fight near the road from Ascot to Maidenhead. A ring was formed with posts and ropes and a large crowd was present encouraging the fighters. In the crowd were Coney and two friends; there was no evidence that they did or said anything or how they came to be in the crowd. *Held*, that the mere voluntary presence at the fight of Coney and his friends did not necessarily render them guilty of an assault as aiding and abetting in such fight.

HAWKINS, J.—Two questions were argued before us. First, whether the combatants themselves were guilty of assaults upon each other? and, secondly, whether the defendants were aiders and abettors in the fight and therefore also rightly convicted?

Upon the first question, the defendants' counsel contended that each of the combatants having assented to the fight, neither could be convicted of an assault upon the other. To this contention I cannot give my sanction. As a general proposition it is undoubtedly true that there can be no assault unless the act charged as such be done without the consent of the person alleged to be assaulted, for want of assent is an essential element in every assault, and that which is done by consent is no assault at all: *Christopherson* v. *Bare*, (*a*) *R.* v. *Guthrie*, (*b*) and numerous other cases. It may be that consent can in all cases be given so as to operate as a bar to a civil action; upon the ground that no man can claim damages for an act to which he himself was an assenting party: . . . It is not necessary, however, upon the present occasion to express any decided opinion upon the point; for whatever may be the effect of a consent in a suit between party and party, **it is not in the power of any man to give an effectual consent to that which amounts to, or has a direct tendency to create, a breach of the peace; so as to bar a criminal prosecution.** In other words, though a man may by his consent debar himself from his right to maintain a civil action, he cannot thereby defeat proceedings instituted by the Crown in the interests of the public for the maintenance of good order: *per* Burrough, J., in

(*a*) 11 Q. B. 473. (*b*) L. R. 1 C. C. R. 241.

R. v. *Bellingham.* (*c*) **He may compromise his own civil rights but he cannot compromise the public interests.**

Nothing can be clearer to my mind than that every fight in which the object and intent of each of the combatants is to subdue the other by violent blows, is, or has a direct tendency to, a breach of the peace, and it matters not, in my opinion, whether such fight be a hostile fight begun and continued in anger, or a prize-fight for money or other advantage. In each case the object is the same, and in each case some amount of personal injury to one or both of the combatants is a probable consequence, and, although a prize-fight may not commence in anger, it is unquestionably calculated to rouse the angry feelings of both before its conclusion. I have no doubt, then, that every such fight is illegal and the parties to it may be prosecuted for assaults upon each other. Many authorities support this view. In *R.* v. *Ward* (*d*) the prisoner was tried for the slaughter of a man whom he had killed in a fight to which he had been challenged by the deceased for a public trial of skill in boxing. No unfairness was suggested, and yet it was held that the prisoner was properly convicted. To the same effect is the case of *R.* v. *Lewis*, (*e*) in which Coleridge, J., said, "When two persons go out to strike each other, each is guilty of an assault. . . ."

The cases in which it has been held that persons may lawfully engage in friendly encounters not calculated to produce real injury to or to rouse angry passions in either, do not in the least militate against the view I have expressed; for such encounters are neither breaches of the peace nor are they calculated to be productive thereof, but if, under colour of a friendly encounter, the parties enter upon it with, or in the course of it form, the intention to conquer each other by violence calculated to produce mischief, regardless whether hurt be occasioned or not, as, for instance if two men, pretending to engage in an amicable spar with gloves, really have for their object the intention to beat each other until one of them be exhausted and subdued by force, and so engage in a conflict likely to end in a breach of the peace, each is liable to be prosecuted for an assault: *R.* v. *Orton.* (*f*) Whether an encounter be of the

(*c*) 2 C. & P. 234. (*d*) 1 East P. C. 270.
(*e*) 1 C. & K. 419. (*f*) 39 L. T. 293.

character I have just referred to, or a mere friendly game having no tendency, if fairly played, to produce any breach of the peace, is always a question for the jury in case of an indictment, or the magistrates in case of summary proceedings. . . .

Upon the ruling of the chairman as to the illegality of the fight, I entertain, therefore, no manner of doubt, and I am clearly of opinion that the combatants themselves were each guilty of an assault upon the other. Nor do I entertain any doubt that all who were present aiding or abetting the fight were liable to be indicted as principals to it; for by 24 & 25 Vict. c. 94, s. 8, "Whoever shall aid, abet, counsel, or procure the commission of a misdemeanour shall be tried, etc., as a principal." Whether the defendants were rightly convicted as aiders and abettors, is a different matter. I am of opinion they were not.

In summing up the case the chairman directed the jury that all persons who went to a prize-fight to see the combatants strike each other, and who were present when they did so, were, in point of law, guilty of an assault, for "if they were not casually passing by, but stayed at the place, they encouraged it by their presence, although they did not do or say anything." The jury, on that direction, found the defendants guilty, but they also found expressly that they were not aiding or abetting. The whole question, therefore, for us to determine, as a matter of law, is not whether voluntary presence at a prize-fight is evidence of an aiding and abetting, but whether inactive presence at a prize-fight as a voluntary spectator thereof, amounts of itself to such encouragement of it as to render a man amenable to the criminal law as an aider and abettor in that breach of the peace. . . .

In my opinion, **to constitute an aider and abettor some active steps must be taken by word, or action, with the intent to instigate the principal or principals.** Encouragement does not of necessity amount to aiding and abetting: it may be intentional or unintentional, a man may unwittingly encourage another in fact by his presence, by misinterpreted words, or gestures, or by his silence, or non-interference, or he may encourage intentionally by expressions, gestures, or actions intended to signify approval. In the latter case he aids and abets, in the former he does not. It is no criminal offence to

stand by, a mere passive spectator of a crime, even of a murder. Non interference to prevent a crime is not itself a crime. *But the fact that a person was voluntarily and purposely present witnessing the commission of a crime, and offered no opposition to it, though he might reasonably be expected to prevent and had the power so to do, or at least to express his dissent, might under some circumstances afford cogent evidence upon which a jury would be justified in finding that he wilfully encouraged and so aided and abetted.* But it would be purely a question for the jury whether he did so or not. So if any number of persons arrange that a criminal offence shall take place, and it takes place accordingly, the mere presence of any of those who so arranged it would afford abundant evidence for the consideration of a jury of an aiding and abetting. A very strong authority upon this point is to be found in the case of *R.* v. *Borthwick.* (*g*) That was an indictment for murder charging the prisoners as principals in the second degree. Willes, J., citing *Messenger's Case* from Kelynge's Reports, said: "Where several acts of force are found to have been actually committed in pursuance of the design" (that is a common illegal design) "there is no need to find the prisoners to have been aiding and assisting, for that is only necessary to be found where the jury find a person was there amongst them, and find no particular act of force done by him, but only in his presence. In the present case it is not found that the prisoners did any act during the affray, or that they were present aiding and assisting; and the Court cannot intend that they were." In *R.* v. *Young,* (*h*) which was an indictment for murder (in a duel between Elliot and Mirfin) against the prisoners as principals in the second degree, Vaughan, J., in addressing the jury, said "mere presence alone will not be sufficient to make a party an aider and abettor; but **it is essential that he should by his countenance and conduct in the proceeding, being present, aid and assist the principals.**" "Did the prisoners give their aid and assistance by their countenance and encouragement of the principals in this contest? It is said one of the prisoners went for the purpose of bringing about a reconciliation, not to give countenance to the continuance of the contest; that is for you" . . .

In *R.* v. *Atkinson,* (*i*) Kelly, C.B., on the trial of the defendants

(*g*) 1 Doug. 247. (*h*) 8 C. & P. 644. (*i*) 11 Cox C. C. 322.

for a riot, expressly ruled "that the mere presence of a person among the rioters, even though he possessed the power, and failed to exercise it, of stopping the riot, did not render him liable on such a charge." And he left the case to the jury with "that in order to find any of the defendants guilty the jury must be satisfied that they had taken part in an assembly for an unlawful purpose, and had **helped, or encouraged, or incited** the others in the prosecution of that purpose."

R. v. TAYLOR

(1875).

L. R. 2 C. C. R. 147; 44 L. J. M. C. 67.

A. and B. quarrelled and agreed to fight. Each of them put down £1 so that £2 should be paid to the winner. T. agreed to hold the £2 as stakeholder, but he did not in any way encourage the fight nor was he present. A. and B. having fought, A. received injuries of which he died. *Held*, that T. was not an accessory before the fact to the manslaughter of A.

COCKBURN, C.J.—The indictment was for abetting a manslaughter. The facts were that the manslaughter occurred in the course of a fight. The accused was not present at the fight and all he had to do with it was that he had consented to hold £2 which the men about to fight deposited by way of binding themselves to fight, and to be given to the winner. It appears to me that to support an indictment against a man as an accessory by abetting an offence, **there must be some sort of active proceeding on his part.** He must incite, or procure, or encourage the act. At first I was struck with the view that the stakes were something essential to the fight, and that the prisoner by holding the stakes might be said to participate in the fight. But I do not think the mere consent to hold the stakes can be said to amount to such a participation as is necessary to support the conviction.

The question suggested by my Brother Mellor, whether there can be an accessory before the fact to a manslaughter of this nature, is one of great difficulty, and it is not necessary to decide it in the present case.

BRAMWELL, J.—The question is whether there has been an abetting.

I think there has not. Nothing that the accused did assisted or enabled the fight to take place.

MELLOR, J.—We need not settle the question to which I called attention during the argument. For there is no evidence that the accused engaged the two men to fight or assisted or counselled them to it.

SOUTH STAFFORDSHIRE WATER COMPANY v. SHARMAN
(1896).
[1896] 2 Q. B. 45; 65 L. J. Q. B. 460.

A workman employed to clean out the plaintiffs' reservoir found two gold rings. *Held*, that the plaintiffs were entitled to the rings.

LORD RUSSELL OF KILLOWEN, C.J.—The case raises an interesting question. The action was in detinue to recover the possession of two gold rings from the defendant. The defendant did not deny that he had possession of the rings but he denied the plaintiffs' title to recover them from him. Under those circumstances the burden of proof is cast upon the plaintiffs to make out that they have, as against the defendant, the right to the possession of the rings. Now the plaintiffs under a conveyance from the corporation of Lichfield are the owners in fee simple of some land in which is situate a pool known as the Minster pool. For purposes of their own the plaintiffs employed the defendant, among others, to clean out that pool. In the course of that operation several articles of interest were found, and amongst others the two gold rings in question were found by the defendant in the mud at the bottom of the pool.

The plaintiffs are the freeholders of the *locus in quo* and as such they have the right to forbid anybody coming on their land or in any way interfering; they had the right to say that their pool should be cleaned out in any way they thought fit and to direct what should be done with anything found in the pool in the course of such cleaning out. It is no doubt right, as the counsel for the defendant contended, to say that the plaintiffs must shew that they had actual control over the *locus in quo* and the things in it; but under the circumstances can it be said that the Minster pool

and whatever might be in that pool were not under the control of the plaintiffs? In my opinion they were. The case is like the case in which several illustrations were put in the course of the argument, where an article is found on private property, although the owners of that property are ignorant that it is there. The principle on which this case must be decided, and the distinction which must be drawn between this case and that of *Bridges* v. *Hawkesworth*, (*a*) is to be found in a passage in Pollock and Wright's "Essay on Possession in the Common Law," p. 41: "The possession of land carries with it in general, by our law, possession of everything which is attached to or under that land, and, in the absence of a better title elsewhere, the right to possess it also. And it makes no difference that the possessor is not aware of the thing's existence. . . . It is free to anyone who requires a specific intention as part of a *de facto* possession to treat this as a positive rule of law. But it seems preferable to say that the legal possession rests on a real *de facto* possession constituted by the occupier's general power and intent to exclude unauthorized interference."

That is the ground on which I prefer to base my judgment. There is a broad distinction between this case and those cited from Blackstone. Those were cases in which a thing was cast into a public place or into the sea—into a place, in fact, of which it could not be said that anyone had a real *de facto* possession, or a general power and intent to exclude unauthorized interference.

The case of *Bridges* v. *Hawkesworth* stands by itself and on special grounds; and on those grounds it seems to me that the decision in that case was right. Someone had accidentally dropped a bundle of bank-notes in a public shop. The shopkeeper did not know they had been dropped, and did not in any sense exercise control over them. The shop was open to the public, and they were invited to come there. A customer picked up the notes and gave them to the shopkeeper in order that he might advertise them. The owner of the notes was not found, and the finder then sought to recover them from the shopkeeper. It was held that he was entitled to do so, the ground of the decision being, as was pointed out by Patteson, J., that the notes, being dropped in the public part of the

(*a*) 21 L. J. Q. B. 75.

shop, were never in the custody of the shopkeeper, or "within the protection of his house."

It is somewhat strange that there is no more direct authority on the question; but the general principle seems to me to be that **where a person has possession of house or land, with a manifest intention to exercise control over it and the things which may be upon or in it, then, if something is found on that land, whether by an employee of the owner or by a stranger, the presumption is that the possession of that thing is in the owner of the locus in quo.**

R. v. McDONALD
(1885).
15 Q. B. D. 323.

An infant [aged 20] obtained goods under a hire purchase agreement and fraudulently converted them to his own use. *Held*, that he was guilty of larceny as a bailee under s. 3 of the Larceny Act, 1861.

Lord Coleridge, C.J.—It is said that the prisoner cannot be convicted of larceny as a bailee, because being an infant he was not competent to enter into a *contract* of bailment; that, the offence charged against him depended upon his having acted in a manner inconsistent with the terms of a contract, he being unable to enter into such a contract cannot be guilty of the offence. It seems to me that this contention is based upon an assumption which is not correct in law. It is not correct, as it appears to me, to use the expression "contract of bailment" in a sense which implies that every bailment must necessarily in itself be a contract. I do not so understand the definitions of the term "bailment." It is perfectly true that in almost all cases a contract either express or implied by law accompanies a bailment, but it seems to me that **there may be a complete bailment without the contract.** According to all the definitions, as, for instance, those given in Sir William Jones, Blackstone, and Kent's "Commentaries," 12th edit., p. 764, it would appear that **a bailment consists in the delivery of an article upon a condition or trust.** It is true, I know, that the authors of those various definitions go on to say that there is a promise or contract to restore the goods, but this is not, as it seems to me, the bailment itself, but a contract

that arises out of it. It may be true that the prisoner in the present case could neither expressly nor impliedly promise to restore the goods, but nevertheless he had the goods delivered to him on a condition or trust and so delivered as to create in him a special property. That being so, he fraudulently appropriates them to his own use in a manner inconsistent with the special property so created. The 3rd section of 24 & 25 Vict. c. 96 says in effect that a person who has obtained delivery of and a special property in goods, and who cannot therefore at common law be guilty of larceny of such goods, shall, if he fraudulently take or convert the same to his own use, be guilty of statutory larceny. It seems to me that undoubtedly the prisoner, though a minor, had the special property in or right of possession of these goods which was contemplated by those who framed this enactment when they used the term "bailee"; that having such special property he proceeded to abuse it and fraudulently to convert the goods to his own use; and that he is therefore guilty of the offence created by the section. He is guilty of the offence not because he has broken a contract, which he was incapable of making, but because, being capable of becoming a bailee of these goods and having become one, he dealt with the goods in such a manner as by the terms of the Act to render him guilty of the crime of larceny.

R. v. TOWNLEY

(1870).

L. R. 1 C. C. R. 315; 40 L. J. M. C. 144.

The prisoner was one of several poachers who wrongfully killed rabbits on Crown land. The dead rabbits were hidden in a ditch on the same land until the poachers could return and take them away. About three hours later the prisoner returned and began to take away the rabbits. *Held*, that the whole transaction was a continuous one and that the removal of the rabbits was not larceny.

MARTIN, B.—I think it is of the utmost importance that the criminal law should rest upon plain and simple principles. Now, if a man kills a rabbit and carries it away at once it is clearly not larceny. But it is said that if he leaves it for a little time before carrying it away it is. And in support of this view a passage from

Hale's "Pleas of the Crown," p. 510, is relied on, where he says, "If a man come to steal trees, or the lead of a church or house, and sever it, and after about an hour's time or so come and fetch it away this hath been held felony, because the act is not continuated but interpolated, and so it was agreed by the Court of King's Bench, 9 Car. 2, upon an indictment for stealing the lead of Westminster Abbey."

A dictum of Gibbs, C.J., in *Lee* v. *Risdon* (*a*) to the same effect is also cited. Those statements may be perfectly correct, and ought perhaps to be followed in cases exactly similar in their facts, where there has been an actual abandonment of possession of the things taken. But **here it is expressly found that there was no abandonment. And where the act is merely interrupted I think it more reasonable to hold that there is no larceny.**

BRAMWELL, J.—And I think our decision is consistent with the passage cited from Hale and the dictum of Gibbs, C.J., referred to, which appear to me quite correct. If a man were unlawfully to dig his neighbour's potatoes, and from being disturbed in his work or any other cause, were to abandon them at the place where he had dug them, and were afterwards with a *fresh intention* to come back and take them away, I think the case would be the same as if during this interval of time the potatoes had been locked in a cupboard by the true owner. Wherever, in such cases, the goods may be said to have been in the possession of the true owner in the interval between the severance and the removal, I think the removal is larceny. But is that so in this case? If the poachers had taken these rabbits to their own house, or to a public-house, can it be supposed that the subsequent removal of them from there would have been larceny? And if the case be varied by supposing them to have placed them upon land adjoining that on which they were killed, can that make any difference? And if so, how can it be otherwise, because the place of deposit chosen is upon the land of the same owner on whose grounds the rabbits were killed. The case seems to me not to fall within the rule laid down by Hale, for, to use his words, the act here was "continuated."

BLACKBURN, J.—If we are to understand these passages in the sense put upon them by my Brother Bramwell, as applying only to

(*a*) 7 Taunt. 188 at p. 191.

a case in which the wrongdoer has abandoned and lost all property and possession in the things in question, I have no quarrel with them, and they do not apply to the present case. But if those passages mean that the mere cessation of physical possession is sufficient to make the subsequent act of removal larceny, then they do apply to the present case. And in that case, great as is my respect for Lord Hale, I cannot follow him. I cannot see that it makes any difference whether those who have taken game hide it in one place or hide it in another.

R. v. SHICKLE

(1869).

L. R. 1 C. C. R. 158; 38 L. J. M. C. 21.

S. was indicted for stealing eleven partridges. The birds had been reared from eggs taken from the nest of a wild partridge and hatched by a common hen. At the time when they were stolen the partridges were three weeks old and were still running with the hen and sleeping under her wings at night, though when older they would have taken to the woods and would not then have differed from birds reared under a wild hen. *Held*, that at the time of taking they were the subject of larceny.

Bovill, C.J.—I am of opinion that, upon the facts stated, the question asked of us must be answered in the affirmative and that the conviction is right. The case states that "from their inability to escape, they were practically in the power and dominion of the prosecutor." That is sufficient to decide the point. In *R.* v. *Cory* (*a*) the law on the subject is very clearly laid down by my Brother Channell. He there says, speaking of pheasants hatched under circumstances similar to those here: "These pheasants, having been hatched by hens, and reared in a coop, were tame pheasants at the time they were taken, whatever might be their destiny afterwards. Being thus, the prosecutor had such a property in them that they would become the subject of larceny and the inquiry for stealing them would be of precisely the same nature as if the birds had been common fowls or any other poultry, the character of the birds in no way affecting the law of the case but only the question of identity." In that statement of the law we all concur. The

(*a*) 10 Cox C. C. 23.

question here is were these birds the subject of property? They were so when first hatched and they remain so at the time they were taken by the prisoner, though it might be that at a later period they would become wild and cease to have an owner. The prisoner therefore was rightly convicted.

BYLES, J.—I am of the same opinion. The usual cases of larceny of animals are those of animals which, being at first wild, have become tame and reclaimed. In this case the only difference is that **the birds here are tame and have been so from their birth, though they may become wild at a future time.**

R. v. FARNBOROUGH

(1895).

[1895] 2 Q. B. 484; 64 L. J. M. C. 270.

F. was charged with stealing milk. The jury could not agree upon a verdict and were asked by the chairman whether they believed the evidence for the prosecution. On the jury replying in the affirmative the chairman directed a verdict of guilty to be entered. *Held*, that the conviction was bad since the jury had not found that the prisoner acted *animo furandi*.

LORD RUSSELL OF KILLOWEN, C.J.—If this case did not raise a question of very considerable public importance, I should be content to say that this conviction cannot be allowed to stand. In dealing with the important question raised we must confine ourselves to what is stated in the case itself, from which it appears that the course which the proceedings took may be described thus. The prisoner was charged with stealing milk; evidence was called in support of the charge and the case was left to the jury on that evidence, no witnesses, except as to character, being called for the defence. The jury retired to consider their verdict, and some time elapsed, during which they made no communication to the chairman as to any point of difficulty in the case; the chairman then very properly sent for them, and asked if they were agreed on their verdict; they answered that they were not; whereupon he asked them whether they believed the evidence given for the prosecution. I do not stop to inquire whether he was right in inviting the opinion of the

jury in this shape: the foreman however answered that question in the affirmative; whereupon the chairman said that their answer amounted in law to a verdict of guilty, and directed that verdict to be recorded. But what did that answer of the foreman amount to, assuming that it expressed the opinion of the rest of the jury? The foreman as the mouthpiece of the jury had said that they were not agreed: and at the second question put to him he answered that they believed the evidence for the prosecution. What did that amount to? That they had heard certain witnesses depose to certain facts, and that they believed they were telling the truth. But it is quite consistent with the credit of the witnesses that the facts proved by them were not such as to shew an *animus furandi* on the part of the prisoner, which is an essential ingredient of the crime of larceny: the jury might have assumed that the prisoner took the milk by leave, or that he intended to pay for it, or that the matter was too trivial to justify a conviction; indeed it is easy to see that the facts might be such as to justify the jury in believing the evidence, and yet declining to draw the inference that the prisoner had any *animus furandi*. The chairman in effect drew that inference himself, and found that the prisoner had acted with a guilty intent—a fact essential to be found before his guilt could be established: in doing so he went beyond his function, and infringed the well-established principle that **the jury are to decide all questions of fact and the judge only questions of law.**

R. v. HOLLOWAY

(1848).

2 C. & K. 942.

A., who was in the employ of B., a tanner, took skins from a warehouse of B. to C., the foreman of B., at another part of the premises, pretending that he had done work on them for which he was to be paid. A. intended to return the skins to his master when he had been paid for his pretended work on them. *Held*, no larceny but an attempt to obtain money by false pretences.

PARKE, B.—Taking a chattel for a temporary purpose is no larceny.

DENMAN, C.J.—If a man took another's horse without leave, intending to ride it to every fair in England (which would take him a

year) and then return the horse at the end of that time, would that be larceny ?

Lowndes (for the prisoner).—I should submit that it might be.

DENMAN, C.J.—I think not ; and if you cannot make that out a larceny, you have no hope here.

Lowndes.—Larceny has never been correctly defined. *Lucri causa* has been sometimes considered necessary, and also an intent to deprive the owner permanently of his property ; but this has never been expressly decided.

PARKE, B.—Yes, in the case from Cornwall. (*a*)

ALDERSON, B.—Is not this a case of false pretence ?

Lowndes.—No money was obtained.

ALDERSON, B.—It is then an attempt to commit the misdemeanour of obtaining money by false pretence.

DENMAN, C.J.—If we were to hold that wrongfully borrowing a thing for a time with an intention to return it would constitute a larceny many very venial offences would be larcenies. In late cases there has been an understanding that **to constitute larceny, it is essential that there should be an intent to deprive the owner permanently of his property.** It is certainly an odd excuse for a person who is challenged with his master's property, that he meant to return it, after having cheated his master, in the first place, and his fellow workman, in the second ; still, a man can hardly do this without committing some offence, although it be not larceny.

PARKE, B.—The definitions of larceny are none of them complete ; Mr. East's is the most so, but that wants some little explanation. His definition is " the wrongful or fraudulent taking and carrying away by any person of the mere personal goods of another, from any place, with a felonious intent to convert them to his (the taker's) own use, and make them his own property without the consent of the owner." This is defective in not stating what the meaning of " felonious " in this definition is. It may be explained to mean that there is no colour of right or excuse for the act ; **and the " intent " must be to deprive the owner not temporarily but permanently of his property.** Cases also shew that a taking of goods with an intent to return them is not larceny. . . . Unless it was made out to the

(*a*) R. *v.* Webb, 1 Moo. C. C. 431.

satisfaction of the jury, that the prisoner meant to deprive his master of his property permanently, I think the offence of larceny was not made out.

COLTMAN, J.—We should look at the cases rather than at definitions, as it is almost impossible to give a definition *à priori* that will embrace every case. No case shews this to be a larceny; and I think that, to constitute larceny, there must be an intent to deprive the owner permanently of his property.

R. v. HALL

(1848).

2 C. & K. 947; 18 L. J. M. C. 62.

H. took fat from a loft of B., a tallow-melter, and brought it to B.'s candle-room and placed it in the scale, and wished B. to buy it as fat sent by a butcher named R. B. refused to buy it, and H. ran away. *Held*, a larceny, and that the fact that the thief intended to induce the owner to buy his own fat made no difference.

Dearsley (for the prisoner).—I submit that the prisoner was not guilty of larceny; and that this is like the case of *Reg.* v. *Holloway* which has just been decided, as the prisoner did not intend to deprive his master permanently of the property.

PARKE, B.—He usurped the entire property in the goods, for the purpose of enabling the other person to sell them to the owner.

Dearsley.—It was never intended that the goods should be taken permanently out of the possession of the owner.

COLERIDGE, J.—In whose dominion were they, when he was trying to sell them?

ALDERSON, B.—In the case of *R.* v. *Holloway* the prisoner never intended to treat the goods as other than the goods of the master. Here he does.

PARKE, B.—Here the intention was never to return the goods to the master, as the master's own property; he was only to get them by paying for them.

Dearsley.—I submit, that to constitute larceny, there must be a taking away for the sake of lucre, an asportation, and an intent to deprive the owner of the goods of his goods for ever *in specie*. I admit there was a *lucri causa* here.

COLERIDGE, J.—You would contend, that if a person took a horse from a field and intended to keep him a month, and disguise him and sell him to the owner as the horse of a third person, that would be no larceny.

Dearsley.—That is exactly this case.

ALDERSON, B.—But a more lively mode of putting it.

Dearsley.—I admit an asportation and a lucre; but so far from any intent to deprive the owner of his property, the intention was that the owner should keep it, but that a cheat should be practised upon him. It is almost a contradiction in terms to say that there was an intent to deprive him of the value of them in money.

ALDERSON, B.—According to your argument, if a man stole a bank-note intending to bring it to the owner to be changed, it would be no larceny.

Dearsley.—As that would fall within the principle I should submit that it would be no larceny.

DENMAN, C.J.—The question here is, whether there was an intent to deprive the owner of his property permanently. How could that be done more effectually than by selling it? It is no matter to whom it is sold.

PARKE, B.—The intent of the party here was not only to deprive the owner of his goods, but to commit the impudent fraud of making him buy his own goods, and pay for them.

ALDERSON, B.—Here the owner is never to get his goods again, but by paying the full value for them.

R. v. WYNN

(1842).

2 C. & K. 859.

W. was indicted for stealing two letters the property of the Postmaster-General. His duty was to open certain bags and sort the letters. In doing so he made a mistake and to avoid detection he carried away two letters and threw them down a water-closet:—*Held*, that he was guilty of larceny.

ALDERSON, B.—If a servant, thinking that his master will inquire for a book, take it to a privy and throw it down, will not that be larceny?

PLATT, B.—Or if a servant take one of his master's books to read, and it being called for, throw it away, intending to destroy it, would not that be larceny?

ALDERSON, B.—It turns on the question, whether the prisoner threw away these letters intending to destroy them. I understand the finding to be, that the prisoner, to prevent the detection of the mistake, intended to destroy the letters.

PARKE, B.—The question is, whether his dropping a letter with intent to destroy it is not a larceny. Is it not a larceny to destroy the property of another, to prevent the detection of a fault; and was there not an asportation here, when the prisoner threw the letter from him?

LORD DENMAN, C.J.—. . . With respect to the larceny I am clearly of opinion that an act of larceny was committed. The jury find that this person takes the letters, intending to withdraw the letters entirely from the owners. This being so, it was a larceny; and the *asportavit* was when he parted with the letters.

R. v. CHARLES RILEY

(1853).

1 Dears. 149.

R. put twenty-nine lambs into a field in which there were already some other lambs. The next morning, in taking away his own lambs, he took by mistake one of the others. On discovering his mistake he sold all the thirty and denied having done so. *Held*, that he was rightly convicted of larceny.

POLLOCK, C.B.—Here the taking of the lamb from the field was a trespass; or if it be said that there was no taking at that time, then the moment he finds the lamb he appropriates it to his own use. The distinction between the cases is this, **if the original possession be rightful, subsequent misappropriation does not make it a felony; but if the original possession be wrongful and then a man disposes of the chattel animo furandi, it is larceny.**

PARKE, B.—The original taking was not lawful. The prisoner being originally a trespasser, he continued a trespasser all along . . . and being a trespasser, the moment he took the lamb with a felonious intent he became a thief.

R. v. THURBORN

(1849).

2 C. & K. 831.

T. was indicted for stealing a bank-note. He found the note, which had been accidentally dropped, on the high road. There was no name or mark on it indicating the owner, nor were there any circumstances which would enable him to discover to whom the note belonged, nor had he any reason to believe that the owner knew where to find it. He meant to appropriate it to his own use after he picked it up. The day after he was informed that the prosecutor was the owner and had dropped it accidentally. He then changed it and appropriated the money to his own use. *Held*, that T. was not guilty of larceny.

PARKE, B.—**To prevent . . . the taking of goods from being larceny, it is essential that they should be presumably lost,** that is, that they should be taken in such a place and under such circumstances as that the owner would be reasonably presumed by the taker to have abandoned them, or at least not to know where to find them. Therefore, if a horse is found feeding on an open common or on the side of a public road, or a watch found, apparently hidden, in a hay-stack, the taking of these would be larceny, because the taker had no right to presume that the owner did not know where to find them, and, consequently, had no right to treat them as lost goods. In the present case, there is no doubt that the bank-note was lost, the owner did not know where to find it, the prisoner reasonably believed it to be lost, he had no reason to know to whom it belonged, and therefore, though he took it with the intent, not of taking a partial or temporary, but the entire dominion over it, the act of taking did not, in our opinion, constitute the crime of larceny. Whether the subsequent appropriation to his own use by changing it with the knowledge at that time that it belonged to the prosecutor does amount to that crime, will be afterwards considered. It appears, however, that **goods which do fall within the category of lost goods, and which the taker justly believes to have been lost, may be taken and converted so as to constitute the crime of larceny, where the party finding may be presumed to know the owner of them, or there is any mark upon them presumably known by him by which the owner can be ascertained.** There are many reported cases on this subject—some where the owner of the goods may be

presumed to be known from the circumstances under which they are found. Amongst these may be mentioned the cases of articles left in hackney-coaches by passengers, which the coachman appropriates to his own use; or a pocket-book found in a coat sent to a tailor to be repaired and abstracted and opened by him. In these cases the appropriation has been held to be larceny. Perhaps these cases might be classed among those in which the taker is not justified in concluding that the goods were lost, because there is little doubt he must have believed that the owner would know where to find them again, and he had no pretence to consider them abandoned or derelict. . . . The appropriation of goods by the finder has also been always held to be larceny where the owner could be found out by some mark on them, as in the case of lost notes, cheques, or bills with the owner's name upon them. . . . The result of these authorities is that the rule of law on this subject seems to be that **if a man find goods that have been actually lost, or are reasonably supposed by him to have been lost, and appropriates them with intent to take the entire domain over them, really believing, when he takes them, that the owner cannot be found, it is not larceny. But, if he has taken them with like intent, though lost, or reasonably supposed to be lost, but reasonably believing that the owner can be found, it is larceny.** . . . To apply these rules to the present case:— The first taking did not amount to larceny, because the note was really lost, and there was no mark on it, nor other circumstances, to indicate then who was the owner or that he might be found, nor any evidence to rebut the presumption that would arise from the finding of the note as proved, that he believed the owner could not be found; and therefore **the original taking was not felonious**; and if the prisoner had changed the note or otherwise disposed of it before notice of the title of the real owner, he clearly would not have been punishable; but after the prisoner was in possession of the note the owner became known to him, and he then appropriated it *animo furandi*; and the point to be decided is, whether that was a felony. Upon this question we have felt considerable doubt. If he had taken the chattel innocently, and afterwards appropriated it without knowledge of the ownership, it would not have been larceny, nor would it, we think, if he had done so knowing who was

the owner; for he had the lawful possession in both cases, and the conversion would not have been a trespass in either. But here the original taking was not innocent in one sense and the question is, does that make a difference? We think not. It was dispunishable, as we have clearly decided; and though the possession was accompanied by a dishonest intent, it was still a lawful possession, and good against all but the real owner; **and the subsequent conversion was not** therefore **a trespass** in this case more than the others, and consequently no larceny. We therefore think the conviction was wrong.

R. v. KERR
(1837).
8 C. & P. 176.

Rebecca Kerr was a nurserymaid who found (or said she found) four £5 notes belonging to her master in the passage of her master's house. She made no inquiry of her master whether the notes were his or not, but appropriated them and took them away from the house. *Held*, that she was guilty of larceny.

PARKE, J.—It is suggested that this is not a felony, because the prisoner might have found the notes in the passage. What passage? Why, the passage of her master's house. What! if I drop a ring is my servant to take it away? The learned counsel has done me the honour to quote a decision of mine in a case on the Oxford Circuit. But there are many decisions of other judges on the subject. There was a case where a pocket-book containing bank-notes was found by a person in the highway, and converted by him to his own use; and Mr. Justice Lawrence there lays it down, that if the party finding property in such a manner knows the owner of it, or if there be any mark upon it by which the owner can be ascertained, and the party, instead of restoring it, converts it to his own use, such converting will constitute felonious taking. In the present case there was no necessity for the prisoner to keep the property till it was advertised; for as she found it in her master's passage **she could have ascertained whether it was her master's**; at least she should have asked him the question. There was a very remarkable case

upon this subject before Lord Eldon when Lord Chancellor in which 900 guineas were concealed in a bureau, which was sent to the East Indies, and brought back again to England without the contents being discovered; and a person purchased the bureau, and delivered it to a carpenter to repair it. The money being discovered the carpenter and his wife and another person secreted it. A bill was filed against them, and they demurred to it, on the ground that an answer might subject them to criminal punishment; and Lord Eldon, after looking into the cases and consulting some of the judges, was clearly of opinion that it was a felony. (*a*)

R. v. HARVEY
(1840).
9 C. & P. 353.

H. was asked by the prosecutor to take three pigs in a cart and shew them to a lady who was a possible purchaser; he was not however to sell the pigs to the lady, but, whether she approved of them or not, he was in any case to bring them back to the prosecutor. H. sold the three pigs to other persons and drove away with the horse and cart to another town where he was taken into custody; on his arrest he said that he was going to take the horse and cart back to the prosecutor when he had dined. He was indicted for larceny of the pigs and of the horse and cart. *Verdict*, guilty of stealing the pigs but not the horse and cart.

ALDERSON, B., in summing up, said,—There are two questions for your consideration in this case. The first is whether the prisoner had a felonious intent from the commencement of the transaction; and the second, whether he received the pigs as bailee to deal with them, or only as a servant having the custody of them, and whose duty it was to bring them back. If the prosecutor meant that the prisoner should leave the pigs with the lady, and either bring back the money or make a bargain for the sale of them, then he will be in the situation of a bailee. The question is whether they were delivered to the prisoner simply that he should shew them to the lady, and bring them back bodily; if they were, then, if the felonious intent came upon him at that time, it would come upon him at the time when he had only the **custody** and **not the possession,** and in

(*a*) *Cartwright* v. *Green*, 8 Ves. 435; 2 Leach, 952.

that case he would be guilty of stealing them. With respect to the horse and cart, it is clear that the **custody** of them only was delivered to the prisoner; and then the question arises, whether he intended to steal them or meant to bring them back to the prosecutor.

R. v. McGRATH

(1870).

L. R. 1 C. C. R. 205; 39 L. J. M. C. 7.

Jane Powell went into a sale room where a mock auction was being held by the prisoner. A piece of cloth was put up for sale and a confederate of the prisoner asserted that Mrs. Powell had bid 26*s.* for it. The prisoner thereupon knocked it down to her and on her denial that she had bid and refusal to pay she was told that she would not be allowed to leave until she had paid. Being afraid she then paid the 26*s.* *Held*, that the prisoner was guilty of larceny.

KELLY, C.B.—I think the conviction ought to be affirmed. The prisoner acted as, and professed to be, an auctioneer. There was a bid for the piece of cloth, and it was knocked down, or at least the prisoner pretended to knock it down to Jane Powell. An altercation then arose. Jane Powell said the cloth was not knocked down to her, and that she had not bid for it. The prisoner knew that this was so, but pretended that she had made a bid for the cloth. He went up to her and intimidated her, for she says in her evidence that she was afraid of him. She was told that she should not leave the room unless she paid for the cloth. In **consequence of being thus frightened by the prisoner and of his threat that she should not leave the room, she paid the money. The meaning of the finding of the jury must be taken to be that she did not pay the money voluntarily.** She was induced to do so by a subterfuge, and also by a threat of what might have amounted to personal violence. Under these circumstances **she parted with the money against her will.** The question is, whether on these facts the prisoner was properly convicted of larceny.

There are several definitions of larceny. Bracton (lib. 3, c. 32) defines it thus: "*Furtum est contrectatio rei alienæ fraudulenta cum animo furandi invito illo cujus res illa fuerit.*" In modern times W. East (2 East P. C. 553) has defined larceny to be "the wrongful or

fraudulent taking and carrying away by any person of the mere personal goods of another with a felonious intent to convert them to his (the taker's) own use, and make them his own property without the consent of the owner." The latter definition has been adopted by Parke, B., (*a*) and other judges of high authority. The Criminal Law Commissioners thus define larceny: "Theft is the wrongfully obtaining possession of any moveable thing which is the property of some other person, and of some value with the fraudulent intent entirely to deprive him of such thing, and have or deal with it as the property of some person other than the owner" ("Cr. L. Com.," 1845–9, 3rd rep.). This case comes exactly within this definition, as the money was taken against the will of the owner. Jane Powell did not part with it voluntarily, but the possession was obtained by fraud and force. Both these causes operated on her mind. **The crime of obtaining money by false pretences differs from larceny. It is constituted by the pretence that something has taken place which, in fact, has not taken place. The present is a different case. Jane Powell was not deceived. She was intimidated, and by the operation of both the intimidation and the surprise at the trick she was induced to give up her money against her will.** It is not necessary to consider whether there was sufficient force used to constitute a robbery. If there was such force then the prisoner was properly convicted of larceny, which is included in the crime of robbery. All the elements of larceny would then be present.

R. v. PRINCE

(1868).

L. R. 1 C. C. R. 150; 38 L. J. M. C. 8.

P. had a deposit account with a bank and had £900 standing to his credit. P.'s wife by a forged order, purporting to be that of P., obtained payment of the £900 deposit and interest and eloped with the prisoner. Among the money paid to P.'s wife was a bank-note for £100 which the prisoner was proved to have paid away shortly after its receipt from the bank and before the elopement. The prisoner said he had it from P.'s wife. *Held*, that the cashier of the bank had a general authority to deal with the money of the bank and to part with it on genuine orders; though

(*a*) *R.* v. *Holloway*, Dears. at p. 375.

he had been deceived by the forged order he intended to part with the property in the money paid to P.'s wife. His offence was not therefore larceny and the prisoner could not be convicted of knowingly receiving a stolen note.

BLACKBURN, J.—I must say I cannot but lament that the law now stands as it does. The distinction drawn between larceny and false pretences, one being made a felony and the other a misdemeanour —and yet the same punishment attached to each—seems to me, I must confess, unmeaning and mischievous. The distinction arose in former times, and I take it that it was then held in favour of life that in larceny the taking must be against the will of the owner, larceny then being a capital offence. However as the law now stands, **if the owner intended the property to pass,** though he would not so have intended had he known the real facts, **that is sufficient to prevent the offence of obtaining another's property from amounting to larceny; and where the servant has an authority co-equal with his master's, and parts with his master's property, such property cannot be said to be stolen, inasmuch as the servant intends to part with the property in it. If, however, the servant's authority is limited, then he can only part with the possession, and not with the property; if he is tricked out of the possession, the offence so committed will be larceny.** In *R.* v. *Longstreeth* (*a*) the carrier's servant had no authority to part with the goods, except to the right consignee. His authority was not generally to act in his master's business, but limited in that way. The offence was in that case held to be larceny on that ground, and this distinguishes it from the pawnbroker's case which the same judges, or at any rate some of them, had shortly before decided. There the servant from whom the goods were obtained had a general authority to act for his master, and the person who obtained the goods was held not to be guilty of larceny. So, in the present case, the cashier holds the money of the bank with a general authority from the bank to deal with it. He has authority to part with it on receiving what he believes to be a genuine order. Of the genuineness he is the judge, **and if under a mistake he parts with the money, he none the less intends to part with the property in it and thus the offence is not, according to the cases, larceny, but an obtaining by false pretences.**

(*a*) 1 Moo. C. C. 137.

R. v. TIDESWELL

(1905).

[1905] 2 K. B. 273; 74 L. J. K. B. 725.

T. was in the habit of buying ashes from B. It was the duty of K., B.'s weigher, to enter in a book a record of the weight of the ashes sold by B., in order that purchasers might be charged with the proper amounts. K. fraudulently and in collusion with T. delivered to T. 32 tons 13 cwt. and entered the weight in the book as 31 tons 3 cwt. *Held*, that T. was guilty of larceny of 1 ton 10 cwt.

Lord Alverstone, C.J.—Upon the point reserved for our consideration upon the case as originally stated, namely, whether the indictment for larceny could be supported in the absence of proof of larceny of any specific portion of the goods, I entertained no doubt whatever. But in the course of the argument a question was raised as to whether the **property** in the goods had not already passed to the prisoner at the time of the fraudulent entry in the weight-book, and whether consequently, whatever other criminal offence he might have committed, he could be properly charged with larceny; and as we thought the case did not sufficiently state the facts with respect to that matter we sent it back to be restated. The question whether the prisoner's offence amounts to larceny must depend upon the circumstances under which he received the goods. Suppose the owner of a flock of sheep were to offer to sell, and a purchaser agreed to buy, the whole flock at so much a head, the owner leaving it to his bailiff to count the sheep and ascertain the exact number of the flock, and subsequently the purchaser were to fraudulently arrange with the bailiff that whereas there were in fact thirty sheep they should be counted as twenty-five and the purchaser should be charged with twenty-five only, there would be no larceny, because the **property** would have passed to the purchaser before the fraudulent agreement was entered into. On the other hand, if the owner were to leave it to his bailiff to arrange the sale, authorizing him to sell as many sheep out of the flock as the purchaser should be willing to buy, then if the contract of sale arranged between the bailiff and the purchaser was expressed to be for twenty-five sheep and the whole thirty were fraudulently delivered to the purchaser, the obtaining possession of the five sheep as to which there was no contract of sale

would amount to larceny. In the present case, as restated, it appears there was no contract with the managing director that the prisoner should buy the whole of the ashes in the trucks, but only such a quantity as should be defined by the weighing; in other words, there was no contract of purchase except that made with K. That being so, the case is governed by the principle in *R.* v. *Hornby*, (*a*) where the prisoner received goods from the servant of the owner under colour of a pretended sale, and it was held that the fact of his having received the goods with the knowledge that the servant had no authority to sell, and was in fact defrauding his master, was sufficient to support an indictment for larceny. Conviction upheld.

R. v. MIDDLETON

(1873).

L. R. 2 C. C. R. 38; 42 L. J. M. C. 73.

M. was a depositor in a P.O. Savings Bank in which 11*s.* stood to his credit. He gave notice to draw 10*s.*; a warrant of withdrawal was accordingly sent to him and a letter of advice sent to the post-office. He went to the post-office and handed in the notice of withdrawal and his deposit-book, but the clerk referred to the wrong letter of advice and put down on the counter £8 16*s.* 10*d.* M. picked up the money and went away. The jury found that at the time of taking the money M. knew of the mistake and had the *animus furandi*. *Held*, that M. was guilty of larceny.

Bovill, C.J.—In the present case the jury have found that the prisoner had *animus furandi* at the moment of taking the money from the counter, and that he knew the money to be the money of the Postmaster-General when he took it up. So far, therefore, as the guilty knowledge and felonious intention are ingredients in the crime of stealing, we must take it as proved that the prisoner was guilty; but the case states facts which raise the doubt whether under the circumstances stated this was a *taking*, and also whether it was a stealing within the meaning put by the law on these averments in an indictment for larceny. . . .

The Lord Chief Justice of the Common Pleas, the Lord Chief

(*a*) 8 C. & P. 288.

Baron, and my Brother Keating, who agree with the majority in thinking the conviction should be affirmed, do so solely on the . . . ground, that the authority of the clerk was a special authority not pursued, and their reasons are stated in two separate judgments.

It is not to be understood that the eight who form the rest of the majority decide this question the other way, but merely that they consider it unnecessary to decide it at all.

We now proceed to state the reasons on which we think that it ought to be held that there was, under the circumstances stated, a " taking " within the meaning of the averment in the indictment.

We agree, that according to the decided cases **it is no felony at common law to steal goods if the goods were already lawfully in possession of the thief ;** and that, therefore, at common law a bailer of goods, or a person who finds goods lost, and not knowing or having the means of knowing whose they were, takes possession of them is not guilty of larceny if he subsequently, with full knowledge and felonious intention, converts them to his own use.

It is, to say the least, very doubtful whether this doctrine is either wise or just ; and the legislature, in the case of bailees, have by statute enacted that bailees stealing goods, etc., shall be guilty of larceny without reference to the subtle exceptions engrafted by the cases on the old law. But in such a case as the present there is no statute applicable, and we have to apply the common law.

Now we find that it has been often decided that where the true owner did part with the physical possession of a chattel to the prisoner, and therefore in one sense the taking of the possession was not against his will, yet if it was proved that the prisoner from the beginning had the intent to steal, and with that intent obtained the possession, it is sufficient taking . . .

In the present case the finding of the jury, that the prisoner, at the moment of taking the money, had the *animus furandi* and was aware of the mistake, puts an end to all objection arising from the fact that the clerk meant to part with the possession of the money.

On the second question, namely whether, assuming that the clerk was to be considered as having all the authority of the owner, the intention of the clerk (such as it was) to part with the property prevents this from being larceny, there is more difficulty, and there

is, in fact, a serious difference of opinion, though the majority, as already stated, think the conviction right. . . .

Now it is established that where a bargain between the owner of the chattel has been made with another, by which the property is transferred to the other, the property actually passes, though the bargain has been induced by fraud. The law is thus stated in the judgment of the Exchequer Chamber in *Clough* v. *L. & N. W. Ry. Co.*, (*a*) where it is said: "We agree completely with what is stated by all the judges below, that the property in the goods passed from the London Pianoforte Co. to Adams by the contract of sale; **the fact that the contract was induced by fraud did not render the contract void, or prevent the property from passing,** but merely gave the party defrauded a right on discovering the fraud to elect whether he would continue to treat the contract as binding, or disaffirm the contract and resume his property. . . ."

It follows obviously from this that no conversion or dealing with the goods, before the election is determined, can amount to a stealing of the vendor's goods; for they had become the goods of the purchaser, and still remained so when the supposed act of theft was committed. There are, accordingly, many cases, of which the most recent is *R.* v. *Prince*, (*b*) which decide that in such a case the guilty party must be indicted for obtaining the goods by false pretences, and cannot be convicted of larceny. In that case however the money was paid to the holder of a forged cheque payable to bearer and therefore vested in the holder, subject to the right of the bank to divest the property.

In the present case the property still remains that of the Postmaster-General, and never did vest in the prisoner at all. There was no contract to render it his which required to be rescinded; there was no gift of it to him, for there was no intention to give it to him or to anyone. **It was simply a handing it over by a pure mistake, and no property passed. . . .**

Bovill, C.J.—Under these circumstances we are of opinion that neither the clerk to the postmistress, nor the postmistress personally, had any power or authority to part with the £5 note, three sovereigns, the half sovereign, and silver and copper, amounting to £8 16*s.* 10*d.*,

(*a*) L. R. 7 Ex. 26. (*b*) L. R. 1 C. C. R. 150.

which the clerk placed upon the counter, and which was taken up by the prisoner.

In this view the present case appears to be undistinguishable from other cases where obtaining articles *animo furandi* from the master of a post-office, though he had intentionally delivered them over to the prisoner, has been held to be larceny, on the principle that the postmaster had not the property in the articles, or the power to part with the property in them. For instance, the obtaining the mail-bags by pretending to be the mail-guard, as in *R.* v. *Pearce*; (*c*) the obtaining a watch from the postmaster by pretending to be the person for whom it was intended, as in *R.* v. *Kay* (*d*) (where *R.* v. *Pearce* was relied upon in the judgment of the Court); and the obtaining letters from the postmaster under pretence of being the servant of the party to whom they were addressed, as in *R.* v. *Jones* (*e*) and in *R.* v. *Gillings*, (*f*) were all held to be larceny.

The same principle has been acted upon in other cases, where the person having merely the *possession* of goods, without any power to part with the *property* in them, has delivered them to the prisoner, who has obtained them *animo furandi*; for instance, such obtaining of a parcel from a carrier's servant by pretending to be the person to whom it was directed, as in *R.* v. *Longstreeth*, (*g*) or obtaining goods through the misdelivery of them by a carman's servant through mistake to a wrong person who appropriated them *animo furandi*, as in *R.* v. *Little*, (*h*) were, in like manner, held to amount to larceny.

In all these and other similar cases, many of which are collected in II "Russell on Crimes," 211–215, the *property* was considered to be taken without the consent and against the will of the owner, though the *possession* was parted with by the voluntary act of the servant, to whom the property had been intrusted for a special purpose. And where property is so taken by the prisoner knowingly, with intent to deprive the owner of it and feloniously to appropriate it to himself, he may, in our opinion, be properly convicted of larceny.

The case is very different where the goods are parted with by the owner himself, or by a person having authority to act for him, and where he or such agent intends to part with the *property* in the

(*c*) 2 East P. C. 603. (*d*) D. & B. 231. (*e*) 1 Den. C. C. 188.
(*f*) 1 F. & F. 36. (*g*) 1 Mood. C. C. 137. (*h*) 10 Cox C. C. 559.

goods ; for then, although the goods be obtained by fraud, or forgery, or false pretences, it is not a taking against the will of the owner, which is necessary in order to constitute larceny.

The delivery of goods by the owner upon an order which was in fact forged, as in *R.*v. *Adams* ; (*i*) the payment of money by a banker's cashier on a cheque which turned out to be a forgery, as in *R.* v. *Prince* ; (*k*) and the delivery up of pledges by a pawnbroker's manager by mistake and through fraud, as in *R.* v. *Jackson*, (*l*) are instances of this kind, and where the intent voluntarily to part with the property in the goods, by a person who had authority to part with the property in them, prevented the offence being treated as a larceny.

R. v. BUCKMASTER

(1888).

20 Q. B. D. 182 ; 57 L. J. M. C. 25.

B. was a bookmaker. At the Ascot Races he laid A. 7 to 1 against a horse and A. deposited 5*s.* with him expecting, if the horse won, to get back his own 5*s.* and 35*s.* in addition. During the race B. disappeared, but was subsequently discovered by A. on another part of Ascot Heath, when he denied all knowledge of the bet. *Held*, that B. was guilty of larceny by a trick.

Lord Coleridge, C.J.—The only question left to us by the case is whether there was any evidence to be left to the jury of larceny. I am of opinion that there was abundant evidence.

It was argued on behalf of the prisoner that the money was intended to be parted with, that is, that the prosecutor intended to part with, not only the possession of the money, but the property in the money, and consequently that the taking by the prisoner was not larceny but obtaining money by false pretences, if it was a crime at all, in other words, that it was false pretences or nothing.

To this contention there are two answers, both of them founded on good sense and supported by authority.

In the first place, supposing there was an intention on the part of the prosecutor to part with the property in the money, in order to pass that property from the prosecutor to the prisoner there must

(*i*) 1 Den. C. C. 38. (*k*) L. R. 1 C. C. R. 150. (*l*) 1 Mood. C. C. 119.

be a contract, that is, the bringing together of two minds, **but here there was nothing in the shape of a contract by which the property could pass,** for if the prosecutor meant to part with the money, it was on the terms that the prisoner should do something with it, that is, should return the money to the prosecutor if the horse won. But the prisoner did not do so and never intended to do so. The facts here are somewhat similar to those in *Oliver's Case*, (*a*) where the prisoner offered to procure gold for the prosecutor in exchange for bank-notes, whereupon the prosecutor put down £35 in notes for the purpose of receiving back their amount in gold, and the prisoner took up the notes and went out of the house with them, promising to return immediately with the gold, but did not return. It was argued that the prosecutor intended to part with the property, but "Wood, B., held that the case clearly amounted to larceny, if the jury believed that the intention of the prisoner was to run away with the notes and never to return with the gold; and that whether the prisoner had, at the time, the *animus furandi* was the sole point on which the question turned; for if the prisoner had, at the time, the *animus furandi*, all that had been said respecting the property having been parted with by the delivery was without foundation, as the property, in truth, had never been parted with at all. The learned judge further said that **a parting with the property in goods could only be effected by contract, which required the assent of two minds; but that in this case there was not the assent of the mind, either of the prosecutor or of the prisoner; the prosecutor only meaning to part with his notes on the faith of having gold in return; and the prisoner never meaning to barter, but to steal.**" That appears to me to be both good sense and sound law, and to be applicable to the present case, even assuming that there was here an intention to part with the property.

But, secondly, I think the true view is that the property in the money was not intended to pass to the prisoner.

In *R.* v. *Robson* (*b*) the circumstances were even more like those of the present case. There "the prosecutor was drawn in to deposit twenty guinea notes on a bet that one of the prisoners could

(*a*) II *Russell on Crimes*, 169, 170, 5th ed., cited in *R.* v. *Walsh* (4 Taunt. at pp. 274, 275). (*b*) MS. Bayley, J., R. & R. 413.

not guess right three times successively on the hiding of a half-penny by another of the prisoners under a pot; he put the notes in the hands of one of the prisoners, and then, the other guessing right, the notes were handed over. The question was left to the jury whether at the time the notes were taken there was not a plan between the prisoners that they should be kept under the false colour of winning a bet; and the jury so found. Upon a case reserved, the judges held that the conviction was right, because at **the time of the taking the prosecutor parted with the possession only."** (*c*) It was held there that the taking was felonious, because the parting with the money was obtained by fraud, and only the possession and not the property passed. Bayley, J., when reserving the case for the consideration of the judges, pointed out that at the time the prisoners took the prosecutor's notes, the latter parted with the possession only, not with the property; and that the property was only to pass eventually if Gill (the man with whom the prosecutor made the bet) *really* won the wager. The prosecutor expected to have been paid had Gill guessed wrong. (*d*)

I am of opinion that the true view of the present case is exactly what was there stated. **Here the prosecutor deposited the money with the prisoner, not intending to part with the property, for he was to have his money back in a certain event, whereas the prisoner when he received the money never intended to give it back in any event.** It is true that the prosecutor would have been satisfied if he had received back, not the identical coins which he deposited, but other coins of equal value, but that does not shew that he meant to part with his right to the money. In my opinion the evidence clearly shews that he meant to do nothing of the kind.

For these reasons I think the prisoner was properly convicted.

R. v. McKALE

(1868).

L. R. 1 C. C. R. 125; 37 L. J. M. C. 97.

A. and B. went into the shop of C. A. asked for a pennyworth of peppermints and put down a florin. C. gave as change a shilling, a sixpence,

(*c*) II *Russell on Crimes*, 176. (*d*) R. & R. at p. 414.

and five pennies, which A. took up. B. said to A., "You need not have changed," and put down a penny. A. took up the penny, put down a sixpence and six pennies and said to C., "Give me a shilling for this." C. put a shilling on the counter. A. then said, "You had better give me the two-shilling-piece and take it all." C. then took from her cash drawer the florin she had received from A. and put it on the counter expecting to receive in exchange for it two shillings of A.'s money. A. took up the florin; C. took up the sixpence and six pennies put down by A. and her own shilling and was putting them into her cash drawer when she realized what had been done. At the same moment B. called away her attention by asking the price of something. A. then interrupted, saying to B., "You don't want any of that," and pushed B. out of the shop, so that both A. and B. left the shop before C. could correct her mistake. *Held*, that A. was guilty of larceny.

KELLY, C.B.—The distinction between fraud and larceny is well established. In order to reduce the taking under such circumstances as in the present case from larceny to fraud the transaction must be complete. If the transaction is not complete, if the owner has not parted with the property in the thing, and the accused has taken it with a fraudulent intent, that amounts to larceny. In this case the prisoner wishes to have back his two-shilling-piece, and is to give two shillings in money to Mrs. Pickering in exchange. She puts down the two-shilling-piece, expecting to receive two shillings of the prisoner's money. Did she part with the property in the two-shilling-piece by putting it down on the counter? It is clear that she did not. If the prisoner had taken it up immediately without giving the change, she would have stopped him. The placing the two-shilling-piece on the counter was only a step in the transaction. Then the prisoner took up the two-shilling-piece. That cannot make the transaction complete, and does not affect the question. Mrs. Pickering next takes up the change. Is the mere taking up of the change a parting with the property in the two-shilling-piece? I am clearly of opinion that it is not. She is putting the change into the drawer when she sees she has only got a shilling of the prisoner's money. She takes up the money imagining it to be the whole change; but she corrects her error in a moment; and but for the act of the confederate she would have said, "You have only given me a shilling: give me the other shilling, or give me back the two-shilling-piece." Up to that time the transaction remained incomplete; and when the prisoner carried off the two-shilling-piece,

he took something **the property in which had not passed out** of her, and calling away her attention by fraud quitted the shop. **He knew that it was her property and that he was taking it against her will, and consequently he was guilty of larceny. The whole question here is whether Mrs. Pickering had finally, and completely and deliberately parted with her property ; and I am of opinion that she had not, and that the prisoner was guilty of larceny.**

R. v. BUNKALL
(1864).
L. & C. 371.

B. had a horse and cart of his own in which he was accustomed to fetch coal for the prosecutor from a railway station, being paid 4*s.* a ton for the carriage. He was requested to fetch half a ton and was given 8*s.* 6*d.* to pay for it. At the station he had 9 cwt. put into the cart and 1 cwt. put into a sack, which was hung on the cart. The prosecutor's name was not mentioned and the receipt was made out in the prisoner's name. On his return he only delivered 9 cwt. to the prosecutor and converted to his own use the remaining cwt. In answer to the questions of the prosecutor, who suspected that he was not getting the whole amount, the prisoner had asserted that there was full weight, for he had seen the coals weighed. *Held*, that he was rightly convicted of larceny as a bailee.

COCKBURN, C.J.—We are all of opinion that the conviction is good. The case turns on the construction of the 24 & 25 Vict. c. 96, s. 3, which enacts that " Whosoever, being a bailee of any chattel, money, or valuable security, shall fraudulently take or convert the same to his own use, or the use of any person other than the owner thereof, although he shall not break bulk or otherwise determine the bailment, shall be guilty of larceny." In this case the prisoner was entrusted with money to buy coals, which he was to bring home to the prosecutor for remuneration in the prisoner's own cart. The prisoner having bought the coals abstracted a portion of them with the intention of appropriating such portion to his own use.

Some members of the Court are of opinion that, even if there was no evidence of any specific appropriation of the coals by the prisoner to the prosecutor, yet, as they were bought with the prosecutor's money given by him to the prisoner for that purpose,

that would *ipso facto* vest the property of the coals in the prosecutor, and so there would be a bailment within the terms of the statute.

Others are of opinion that a specific appropriation of the coals by the prisoner to the prosecutor was necessary and that there was evidence of such specific appropriation. The prisoner went with the prosecutor's money to buy coals, put them into the cart and took a portion for himself, pretending to the prosecutor that he had brought the whole of the coal to him. We are all of opinion that this was evidence of a **specific appropriation** sufficient to justify the jury in coming to the conclusion at which they arrived.

R. v. COOKE

(1871).

L. R. 1 C. C. R. 299; 40 L. J. M. C. 68.

C. was employed as foreman by B. It was C.'s duty to make up the wages book and obtain from B.'s cashier the amount necessary to pay the workmen. C. fraudulently entered in the wages book the sum of £1 10*s.* 4*d.* as due to a workman to whom only £1 8*s.*, was due. The total amount of the wages due was thus represented as £21 18*s.*, which A. received from the cashier. After obtaining this sum he paid to the workman in question his proper wages of £1 8*s.* and appropriated to his own use the excess of 2*s.* 4*d.*, intending to do so at the time when he received the sum of £21 18*s.* *Held*, that C. was guilty of larceny.

Bovill, C.J.—The point submitted to us is whether in this case there was any evidence to go to the jury of a larceny. The objection was, that even if the facts, as stated, were proved, the offence of the prisoner was not a felony, but that of obtaining money by false pretences. . . . Now, it is expressly stated that the prisoner, after receiving £21 18*s.* of his master's money, paid *thereout* certain moneys on his master's account, and "fraudulently appropriated *thereout* to his own use the sum of 2*s.* 4*d.*" Thus the whole foundation of one of Mr. Streeten's arguments fails. He says the jury could not find that the particular moneys intrusted, or any particular moneys, were appropriated. The case states otherwise. It steers clear of the difficulties which have arisen in some cases, such as *R.* v. *Thompson*, (*a*) inasmuch as the misapplication is found

(*a*) L. & C. 233; 32 L. J. (M. C.) 57.

to have been of a portion of the very moneys delivered to the prisoner.

It was next contended that the manner in which the prisoner obtained the £21 18*s.* was an obtaining the money by false pretences but did not amount to larceny. If this had been the only circumstance in the case, the question would have had to be determined, and it would have been a question for the jury.

But **after the money was handed over, whose property was it? I think the evidence shews it was the master's; and, if so, at common law, the possession was the master's too. A servant and a bailee at common law are in a different position; for a bailee has the possession of the goods entrusted to him, a servant only the custody. A servant could therefore be indicted for stealing the things in his custody, but in his master's possession.** Difficulties arose, it is true, in cases where the servant received property from a third person, and appropriated it to his own use before it ever came into the hands of his master or of any fellow servant for him. And hence the statutes as to embezzlement were passed. But in all other cases the offence was larceny at common law as in *R.* v. *Watts.* (*b*) So in **this case the money, while in the prisoner's hands, was clearly his master's money at the time of the misappropriation, and it was in the constructive possession of the master. The misappropriation of it was therefore larceny.**

Even if the prisoner had anything more than the bare custody of the money as a servant, it is difficult to see why he did not hold it as a bailee within the meaning of the section which has been referred to. But this it is unnecessary to decide.

R. v. GNOSIL

(1824).

1 C. & P. 304.

The prisoner was indicted for a highway robbery. The prosecutor proved, that as he was going along the street at Walsall, the prisoner laid hold of his watch and chain, and with considerable force jerked his watch from his pocket; a scuffle ensued and the prisoner was secured,

(*b*) 2 Den. C. C. 14.

GARROW, B.—The mere act of taking, being forcible, will not make this offence a highway robbery: **to constitute the crime of highway robbery, the force used must be either before, or at the time of the taking, and must be of such a nature, as to shew that it was intended to overpower the party robbed, and prevent his resisting, and not merely to get possession of the property stolen.** Thus, if a man walking after a woman in the street were by violence to pull her shawl from her shoulders, though he might use considerable violence, it would not, in my opinion, be highway robbery; because the violence was not for the purpose of overpowering the party robbed, but only to get possession of the property.

R. v. STREETER

(1900).

[1900] 2 Q. B. 601; 69 L. J. Q. B. 915.

A. and B. were indicted for larceny in a dwelling-house and for receiving the same property. A. was the prosecutor's wife, B. had been their lodger. When B. left A. packed up goods belonging to her husband and sent them to B., afterwards she left her husband and went to live with B. The property was found in their possession. *Held*, that as the stealing of a husband's property by his wife was not a felony at common law or under the Larceny Act, 1861, B. could not be convicted of felony under s. 91 of the Larceny Act, 1861, by reason of his receiving property stolen by A. from her husband.

MATHEW, J.—The conviction in this case must be quashed. The point is really concluded by the decision in *R.* v. *Smith.* (*a*) Formerly there were two cases in which an indictment for larceny could not be preferred. The first case was that of a wife taking the goods of her husband, and the second was that of a partner taking the goods of a partnership. Both these cases have been brought within the criminal law by Act of Parliament, the case of a partner by the Larceny Act, 1868 (31 & 32 Vict. c. 116), and that of a wife by the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75, ss. 12, 16). The question which we have to determine is, whether the present case comes within the terms of the Larceny Act, 1861 (24 & 25 Vict. c. 96, s. 91), so as to render the male prisoner liable to be convicted of receiving. The material words of that section are as follows:

(*a*) L. R. 1 C. C. R. 266.

"Whosoever shall receive any chattel, money, valuable security, or other property whatsoever the stealing, taking, extorting, obtaining, embezzling or otherwise disposing whereof shall amount to a felony either at common law or by virtue of this act knowing the same to have been feloniously stolen . . . shall be guilty of felony." Here the act of the woman in taking her husband's property, which would not have been a felony either at common law or by virtue of the Larceny Act, 1861, has been made a criminal offence by another Act, the Married Women's Property Act, 1882, ss. 12 and 16, but this does not bring it within the words, "either at common law or by virtue of this Act," that is the Larceny Act, 1861. *R.* v. *Smith* was a case in which partnership property had been stolen by a partner and received by the prisoner, the stealing being a criminal offence by virtue of the Larceny Act, 1868, and it was held that the prisoner could not be convicted of receiving under the Larceny Act, 1861, s. 91. Our decision must be to the same effect, that is that the prisoner cannot be convicted of receiving property stolen by a wife from her husband.

WRIGHT, J.—I agree that this prisoner could not properly be convicted under the Larceny Act, 1861, s. 91, but in future cases it seems that there might be an indictment for receiving at common law.

LAWRANCE, KENNEDY, AND DARLING, JJ., concurred.

R. v. VILLENSKY

(1892).

[1892] 2 Q. B. 597; 61 L. J. M. C. 218.

A. and B. were indicted for feloniously receiving stolen goods, the property of C. P. & Co. The goods were in a parcel delivered to C. P. & Co. for carriage to Holloway. When the parcel arrived at the depôt of C. P. & Co. it was, with other parcels, unloaded from the collecting van. The actual thief was Clark, a servant of C. P. & Co., who removed the parcel from the part of the platform appropriated to Holloway parcels to the part appropriated to Spitalfields parcels and addressed it to A. and B. at Spitalfields. The conduct of Clark was seen by a fellow servant and reported to a superintendent. The superintendent inspected and replaced the parcel and ordered that it should be sent by special delivery to A. and B. The parcel was accordingly sent and received by A. and B.

under circumstances shewing that they knew it had been stolen. *Held*, that as C. P. & Co., on whom the property in the goods was laid by the indictment, had resumed possession of the parcel before its receipt by the prisoners it had then ceased to be stolen property and A. and B. could not be convicted of receiving.

Lord Coleridge, C.J.—This is in my opinion a perfectly plain case. . . . There is no doubt that Clark stole these goods and the other two prisoners intended to receive them; but the carriers, in whose name those responsible for the prosecution insisted on the case going on, had in the meantime, before its receipt by the prisoners, got hold of the property which, by their special directions, was sent off to the prisoners' house in a special van accompanied by two detectives. I must confess that I cannot conceive of a case of resumption of possession if this is not one.

A. L. Smith, L.J.—I am of the same opinion. The prisoners have been convicted of receiving stolen property knowing it to have been stolen, and **the only question for us is whether, at the time they received it, it was stolen property.** There is no doubt that Clark stole it; but after the theft the carriers resumed possession of the property, and delivered it to the persons who had been convicted of receiving it. . . . I think it clear that possession of the stolen property was resumed by the carriers.

R. v. NEGUS

(1873).

L. R. 2 C. C. R. 34; 42 L. J. M. C. 62.

N. was engaged by B. to solicit orders for him and was to be paid by a commission on money received by his means. He had no authority to receive money and was bound to hand over to B. all money received. Contrary to his duty he applied for payment of £17 and having received it applied it to his own use. *Held*, that N. was not a "clerk or servant" within s. 68 of the Larceny Act, 1861, and could not be convicted of embezzlement.

Bovill, C.J.—The only question submitted to us is whether, on the facts stated, the prisoner was a "clerk or servant" and as such rightly convicted of embezzlement. The learned assistant judge of

the Court directed the jury to find the prisoner guilty, subject to this point being raised.

Generally speaking, I should say that the question whether a person is a clerk or servant depends on so many considerations that it is one to be left to the jury, as it is extremely difficult for the Court to come to a satisfactory conclusion upon such a matter. Much depends on the nature of the occupation in which the individual is engaged, and the kind of employment. But we have to see if there was enough evidence to shew that the prisoner here was a clerk or servant. I think that that fact is not sufficiently made out. **What is a test as to the relationship of master and servant? A test used in many cases is, to ascertain whether the prisoner was bound to obey the orders of his employer so as to be under his employer's control**; and on the case stated there does not seem sufficient to shew that he was subject to the employers' orders, and bound to devote his time as they should direct; although under this engagement with them, it appears he was still at liberty to take orders, or to abstain from doing so, and the masters had no power to control him in that respect. Where there is a salary, that raises a presumption that the person receiving it is bound to devote his time to the service, but when money is paid by commission a difficulty arises, although the relationship may still exist where commission is paid, as in ordinary cases of a traveller, and in *R.* v. *Tite* (*a*) and the other case cited. But in either case there may be no such control, and then the relationship does not exist. All the authorities referred to seem to shew that **it is not necessary that there should be a payment by salary—for commission will do—nor that the whole time should be employed, nor that the employment should be permanent,** —for it may be only occasional, or in a single instance—if at the time the prisoner is engaged as servant. The facts before us do not make out what the prosecution was bound to prove, viz. that the prisoner was clerk or servant.

BLACKBURN, J.—I am of the same opinion. The test is very much this, viz. whether the person charged is **under the control and bound to obey the orders of his master.** He may be so without being bound to devote his whole time to this service; but if bound

(*a*) L. & C. 29.

to devote his whole time to it, that would be very strong evidence of his being under control. This case differs in nothing from the ordinary one of a commission agency, except in the sole statement that the prisoner was not to work for others. But I do not think that circumstance by itself alone enables us to say that he was a servant of the prosecutor.

R. v. BOWERS

(1866).

L. R. 1 C. C. R. 41 ; 35 L. J. M. C. 206.

B. entered into an agreement with A. by which he was to become the agent or traveller of A. for the sale of coals, receiving one guinea per week as salary and one shilling per ton as commission on all coals sold by him. B. was to collect all money due for coals sold by him and was not to keep in his possession more than one week after its receipt any money collected. A. was to have the use of B.'s office without charge. The agreement might be terminated by a month's notice on either side. At a later date B. wished to sell coal on his own account and A. consented to supply him with coal for that purpose, ceasing to pay him a salary, but allowing him a commission on the sale of coal supplied.

Under this agreement B. accounted to A. monthly, reporting all payments made by purchasers of the coal supplied by A., the invoices for which were made out in the name of A.'s firm, and paying over to A. the surplus beyond his commission. B. failed to report payments by three of such purchasers and represented their accounts as still unpaid. *Held*, that B. was not a clerk or servant of A. within s. 68 of the Larceny Act, 1861, and could not be convicted of embezzlement.

Erle, C.J.—We are all of opinion that this conviction must be quashed. The facts stated fall within the cases cited by Mr. Collins, which decide that **a person who is employed to get orders and receive money, but who is at liberty to get those orders and receive that money where and when he thinks proper, is not a clerk or servant within the meaning of the statute.** The construction of the documents decides this case. Under the first agreement the prisoner was a servant; but under the second he was at liberty to dispose of his time in the way he thought best, and to get or to abstain from getting orders on any particular day as he might choose; and this state of things is inconsistent with the relation of master and servant.

R. v. MASTERS

(1848).

2 C. & K. 930.

M. was tried at the Quarter Sessions on an indictment which charged that he, being a servant of William Holliday, embezzled three several sums received by him, by virtue of his employment, for and on account of his master. The prisoner was convicted subject to the opinion of the judges on a case, which stated as follows:—

"The course of business adopted by the prosecutor's house was for the customers to pay moneys into the hands of certain persons, who paid them over to a superintendent; he accounted with the prisoner, and paid over such moneys to him and the prisoner, in his turn, accounted with cashiers, and paid over the moneys to them, he having no other duty to perform with respect to such moneys than to keep an account which might act as a check on the superintendent and the cashiers, their accounts being in like manner checks upon him. These four parties to the receipt of the moneys were all servants of the prosecutor. With respect to the three sums in question, it was proved that they passed in due course from the customers, through the hands of the intermediate receivers, and the superintendent, to the prisoner, who wilfully and fraudulently retained them."

POLLOCK, C.B.—We are all of opinion that the conviction is right. We think that the case of *R.* v. *Murray* (*a*) is distinguishable from the present. There the prisoner had received the prosecutor's money from another of his clerks, to apply for a particular purpose, and he appropriated it to his own use; and that was not an embezzlement within the statute. **Here the money was really on its way to the master,** and the prisoner was one of those who was to receive the money on account of his master, and he embezzled it before it got to the master.

(*a*) 5 C. & P. 146; 1 Moo. C. C. 276. Indictment for embezzlement. The prisoner was a clerk in the employ of A. He received from another clerk £3 of A.'s money in order that he might pay for an advertisement in the *Gazette*. He paid £1 for the advertisement and charged A. £2 0*s.* 6*d.*, keeping the difference, which he converted to his own use. On a case reserved all the judges were of opinion that this was not embezzlement because A. had had the possession of the money by the hands of the other clerk.

R. v. CULLUM

(1873).

L. R. 2 C. C. R. 28; 42 L. J. M. C. 64.

C. was employed by B. as captain of one of his barges and was remunerated by half the net earnings of the barge. His duty was to take the barge to London and bring back such cargo as B. should direct; he had no authority to take any cargo other than that directed by B. In one voyage he was given directions to bring back a certain cargo and was expressly forbidden to carry a cargo of manure to a Mr. Pye at Caxton. In disobedience to his orders he did carry the manure to Pye, but denied having done so and failed to account for £4 which Pye paid as freight. Pye contracted solely with A. and knew nothing about B. *Held*, that C. could not be convicted of embezzlement.

Bovill, C.J.—In the former Act relating to this offence were the words "by virtue of his employment." The phrase led to some difficulty. . . . Therefore in the present statute (*a*) those words are left out; and s. 68 requires instead that, in order to constitute the crime of embezzlement by a clerk or servant the "chattel, money, or valuable security . . . shall be delivered to, or received, or taken into possession by him, for or in the name or on account of his master or employer."

Those words are essential to the definition of the crime of embezzlement under that section. **The prisoner here, contrary to his master's order, used the barge for his, the servant's own purposes, and so earned money which was paid to him not for his master, but for himself;** and it is expressly stated that there was no proof that he professed to carry for the master, and that the hirer at the time of paying the money did not know for whom he paid it. The facts before us would seem more consistent with the notion that the prisoner was misusing his master's property, and so earning money for himself, and not for his master. Under those circumstances the money would not be received "for" or "in the name of" or "on account of" his master, but for himself, in his own name, and for his own account. His act, therefore, does not come within the terms of the statute, and the conviction must be quashed.

Blackburn, J.—I am also of opinion that this conviction cannot be supported. Without criticizing the words of the Act, let us look

(*a*) Larceny Act, 1861.

at the object of passing it. The common law requires for the offence of larceny, not only *animus furandi*, but there should be a taking, and it was held, on the narrow distinctions of the common law, that when the property only became the master's by coming into the hands of his servant and not otherwise, the servant could not be said to take his master's property because it came into his hands at the moment it was so received.

It was to meet this difficulty that the legislature said, "He who embezzles shall be guilty of stealing although the property has not become the master's except by the possession of the servant"; and in the original Act were the words "by virtue of his employment," which have been expressly omitted from the more recent statute; yet still the essence of the matter is, that the servant shall be deemed to have stolen the master's property, if it be his master's property although not received otherwise than in the prisoner's capacity of clerk or servant. That is, I take it, the key to the meaning of the whole enactment; the technical objection as to the possession is removed. Therefore, I think the opinion expressed by Mr. Davis, in his edition of these Acts, (*b*) that "it still **must be the master's money which is received by the servant"** is correct enough, although the context, "and not money wrongfully received by the servant by means of false pretences or otherwise," is not quite accurate, because it may be received for the master although obtained by false pretences. Now in the present case I cannot see how this was the master's property, or that the servant had authority to carry anything in this barge, but the cargo he was directed to convey. He was actually forbidden to load this barge on the return voyage; he did load and very improperly earned money by the use of it; but in what sense he can be said to have received this sum for the use of his master I cannot understand. The test of the matter would really be this—if the person to whom the manure belonged had not paid for the carriage, could the master have said, "There was a contract with you, which you have broken, and I sue you on it"? There would have been no such contract, for the servant never assumed to act for his master, and on that ground his act does not come within the statute. I think that in no

(*b*) Davis' *Criminal Statutes*, p. 70.

case could he have been properly convicted under the Act unless the money became that of the master.

R. v. GALE

(1877).

2 Q. B. D. 141; 46 L. J. M. C. 134.

A. was the head manager of an insurance company. In the ordinary course of business he received from the managers of branch offices cheques for £600 payable to his order, which he should have indorsed and handed to the cashier of the company. Instead of so doing A. indorsed the cheques and cashed them through friends; he then paid to the cashier £600 in notes and gold, presumably the proceeds of the cheques, saying that he wished it to go against his salary which was overdrawn; in exchange he received back from the cashier his I O U's for £600 which he had previously given in respect of the overdraft. *Held*, that A. was guilty of embezzling the proceeds of the cheques.

COCKBURN, C.J.—I entertain no doubt that this conviction must stand. On the face of the case, there can be no doubt that the prisoner might have been convicted of embezzling the cheques. He has been indicted, however, for embezzling the proceeds of the cheques. And the difficulty suggested arises from the fact that, instead of cashing the cheques at the bank, the prisoner obtained money for them from friends of his own, who, having given him the money, paid the cheques to their own bankers. Now, the prisoner is liable under the statute if he received the money on account of his masters. But **the question is not whether those persons paid on account of his masters, but whether he received on account of his masters.** And he did so because it was his duty to pay over the proceeds at once, in whichever way he received them. It is the same case as if, being on his way to cash the cheques, he had met a friend in the street who cashed them for him, to save him the trouble of going to the bank. The prisoner, then, having received the money on account of his masters, and having dealt with it as he did, with the intention of appropriating it to his own use, was rightly convicted of embezzlement.

LORD COLERIDGE, C.J.—I am of the same opinion, and for the same reasons. I will only add that the statute speaks not only of

a receipt "for or in the name of" the master, which may contemplate knowledge in the person paying, but also of a receipt "on account" of the master, that is, where the servant is bound to account to the master.

R. v. JONES
(1897).
[1898] 1 Q. B. 119.

J. ordered and consumed a meal in a restaurant, having only one halfpenny in his possession. He made no verbal representations as to his ability to pay and no questions were asked him. *Held*, that J. could not be convicted of obtaining goods by false pretences, but that he could be convicted of obtaining credit by fraud under s. 13 (1) of the Debtors Act, 1869.

Lord Russell, C.J.—The facts were shortly these. The prosecutor kept an eating-house, and on June 20 the defendant went in and asked for some soup; he was told that there was none ready, and thereupon asked for some cold beef; he was told that there was none, but that he could have some cold lamb and salad; and this he accordingly ordered. He then ordered half a pint of sherry, and went upstairs to have his meal; while there he rang the bell, and ordered another half pint of sherry. Subsequently he again rang the bell and asked what there was to pay; and upon being told four shillings, said that he had no means of paying, that he had no money and had (as was the fact) only a halfpenny upon him. Such was the state of the facts. All that the defendant did was to go into an eating-house, order food and refreshment, and eat, but not to pay for it; no question was put to him and no inquiry was made from him by the prosecutor as to his means, nor was any statement made by him whether he had means to pay. The question is whether this can be regarded as a state of things in which a jury would be justified in finding that the defendant obtained consumable articles by false pretences. We do not desire to say anything which can weaken the authority of the decisions which say that there can be a false pretence by conduct; for example the

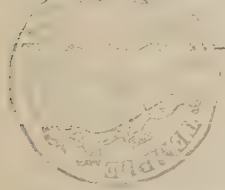
case of *R.* v. *Barnard*, (*a*) where a cap and gown were used by a man who had no right to wear them, in order to convey the notion that he was a member of the university. Nor do we in any way dispute the authority of another class of cases; that is, where a man gives a cheque on a bank where he either has no account or has not sufficient means to meet the cheque and must have known that he had not sufficient means. **In the present case the defendant did nothing beyond what I have already stated: no inquiry was made of him, and no statement was made by him.** Under the circumstances, we do not think that the case could properly be left to the jury on the first count; **there was no evidence that the defendant had obtained these articles by false pretences.**

A further question arises; it is provided by s. 88 of the Larceny Act, 1861, that if, upon the trial of any person indicted for the misdemeanour of obtaining goods by false pretences, it is proved that he obtained them in such manner as to amount in law to larceny, he shall not by reason thereof be entitled to be acquitted of such misdemeanour. But in the present case the defendant did not commit larceny. In the circumstances of the case it is quite clear that **the prosecutor parted not merely with the possession, but also with the property in his goods,** and that he intended to do so, for the goods were intended for immediate consumption. **The finding of the jury that the defendant was guilty of obtaining goods by false pretences cannot therefore be supported on that ground,** and the conviction on the first count is bad.

The second count is framed upon a different statute, upon s. 13 of the Debtors Act, 1869, which provides that in certain cases a person shall be deemed guilty of a misdemeanour, the first case being if in incurring any debt or liability he has obtained credit under false pretences or by means of any other fraud. There are three elements which have to be considered in the construction of that section: first, there must be the incurring of a debt or liability; secondly, there must be an obtaining of credit; and thirdly, there must be fraud: the conjunction of these three ingredients makes the offence. No one can doubt that the defendant did incur a debt or liability; he ordered goods under circumstances which implied

(*a*) 7 C. & P. 784.

a promise to pay for them. Then did he obtain credit? We are of opinion that he did. The prosecutor might have said that he would not furnish him with the goods until he paid the price, or he might have insisted on payment in actual exchange for each article as it was supplied, but he did neither; he furnished the goods under circumstances which passed the possession and property in them, **relying on the readiness and ability of the defendant to pay.** It does not seem to matter that the period of credit was a short period; he trusted the defendant, and parted with his goods without insisting on prepayment or upon interchangeable payment. We think, therefore, that credit was obtained. Thirdly, was there fraud? There was a debt and there was credit, and we think there was ample evidence to justify the jury in arriving at the conclusion that the defendant was guilty of fraud. He goes to an eating-house where the ordinary custom is to pay directly after the goods have been consumed; he knows that such goods are supplied, not on personal knowledge, but on the understanding that the ordinary custom will be observed. The jury found that he had no intention of paying; he intended to cheat and so the jury found. We think therefore that the conviction was right upon the second count, and that it must be affirmed.



R. v. BARNARD
(1837).
7 C. & P. 784.

The indictment charged that the prisoner falsely pretended that he was an undergraduate of the University of Oxford, and a commoner of Magdalen College, by means of which he obtained a pair of boot-straps from J. S. V.

It appeared that J. S. V. was a bootmaker, carrying on business in High Street, Oxford; and that the prisoner came there, wearing a commoner's cap and gown, and ordered boots, which were not supplied to him, and straps, which were sent to him. He stated he belonged to Magdalen College.

It was proved by one of the butlers of Magdalen College that the prisoner did not belong to that college, and that there are no commoners at Magdalen College.

BOLLAND, B.—If nothing had passed in words, I should have laid

down that the fact of the prisoner's appearing in the cap and gown would have been pregnant evidence from which a jury should infer that he pretended he was a member of the university, and if so, would have been a sufficient false pretence to satisfy the statute. It clearly is so by analogy to the cases in which offering for payment the notes of a bank which has failed, knowing them to be so, has been held to be a false pretence, without any words being used.

R. v. HAZELTON

(1875).

L. R. 2 C. C. R. 134; 44 L. J. M. C. 11.

H. ordered goods saying that he wished to pay ready money for them and gave in part payment a cheque for £5 drawn on a bank where he had only a deposit of a few shillings. Other cheques drawn by him had been refused payment and he would not have been allowed to overdraw. *Held*, that there was evidence of a false pretence that the cheques were good and valid orders for the payment of their amount.

KELLY, C.B.—There are two questions in this case; first whether the prisoner has expressly or impliedly made a representation upon the faith of which goods have been obtained, and, secondly, whether that representation was false.

Several representations are laid in the indictment, and are proposed to us in the case as arising from the conduct of the prisoner in the present case. It is suggested that a person acting as the prisoner did represents that he then has money, to the amount of the cheque which he tenders, in the bank upon which it is drawn. If this had been the only representation suggested there would have been great difficulty in upholding the conviction. The giving of a cheque does not necessarily imply any such representation. Not only may a banking account be kept under a guarantee upon the express terms that it may be overdrawn, but, without any such arrangement, a person of position may often overdraw an account in perfect good faith and with the tacit sanction of his bankers.

Then it is suggested that the conduct of the prisoner amounted to a representation that he had authority to draw upon the bank for

the sum for which he drew. I think that representation does not arise. I do not see how it can be implied.

But **as to the third representation there can be no doubt, namely, that the cheque is a good and valid order for the payment of its amount.** The case which has been cited, *R.* v. *Parker*, (*a*) is express upon the point; and that the goods were obtained upon the faith of the representation admits of no question.

It remains to consider whether the representation made was untrue. If a man's account were overdrawn and he had reason to suppose that his cheque would still be honoured this might be consistent with his having authority to draw and with his cheque being a good and valid order. But in the present case it is quite clear that the prisoner knew that his account at the bank was virtually closed, and that he knew his cheque would not be paid. He had therefore no authority to draw, and his cheque was not a good and valid order, that is to say one which might be cashed.

BRETT, J.—It is material, first, to see exactly what the question asked of us is. **In order to constitute the offence charged in the indictment a man must make a pretence or representation as to existing facts; it must be false to his knowledge; money or goods must be obtained thereby, and with intent to defraud.** Now the case states that the Common Serjeant doubted, upon the decided cases, whether in point of law a man who gives a cheque in payment under the circumstances before mentioned does by the mere fact of giving the cheque, without saying more than that he wishes to pay ready money, make either of the false pretences alleged in the indictment. And the question asked of us is whether there was any evidence to go to the jury of the prisoner having made any of the false pretences mentioned in the indictment. The only question asked of us is whether there was evidence of any of the representations mentioned.

The first representation suggested is that the prisoner, when he gave the cheque, had a balance in the bank sufficient to meet it. A representation must depend upon what a man says and does, and what his words and acts would convey to the mind of another. It cannot depend upon the state of his own mind. Now, it is a matter

(*a*) 7 C. & P. 829.

of common knowledge that people do draw cheques, though they have not at the time funds at their bankers. Therefore this representation cannot arise.

The second suggested representation is, that the prisoner had authority to draw for the amount. If giving a cheque in payment does not mean this, it means nothing. There is therefore evidence of this representation. As to the third representation charged, but for the authorities I should have doubted. But upon the authorities I think it does arise. I also think there is evidence of the fourth false representation charged.

R. v. BANCROFT

(1909).

3 Cr. App. R. 16.

B. was convicted of obtaining money by false pretences. He had during March and April canvassed for and obtained payment for advertisements in a directory which he represented was to be published in May. *Held*, that a promise to do something in the future may imply a representation as to an existing fact which, if false, may be a sufficient false pretence to maintain an indictment.

The Lord Chief Justice.—[The point has been raised] that a statement as to a future fact was not a representation of an existing state of things and therefore was not a false pretence. I cannot do better than read the summary of the law on the subject as given at p. 600 of the last (23rd) edition of Archbold's "Criminal Pleading": "A promise to do a thing *in futuro* may involve a false pretence that the promisor has the power to do that thing, for which false pretence the promisor would be indictable." Now, in view of that principle, let us look at some of the incidents of the false pretences proved. One witness, when asked "What do you say was a false statement?" answered "That the book was going to be published early in May." . . . Other witnesses gave evidence to the same effect. In these circumstances it was for the jury to say whether it was a statement made of an existing state of facts that he intended to get it published in May, and that the thing was *in order for publication* in May, and the jury have answered that question against the appellant. . . . The appeal must be dismissed.

R. v. JENNISON
(1862).
L. & C. 157.

J., who had a wife living, told the prosecutrix that he was unmarried, and pretending that he intended to marry her, induced her to give him £8, representing that he would furnish a house for them to live in and would then marry her. Having obtained the money the prisoner went away and did not return. For the prisoner it was argued that the money had been obtained by the joint operation of the three representations by the prisoner, that he was unmarried, that he would furnish a house, and that he would marry the prosecutrix; and that as only the first pretence had reference to an existing fact, while the others related to things to be done *in futuro*, the indictment could not be maintained.

ERLE, C.J.—In this case we are all of opinion that the prisoner was properly convicted. He was indicted for obtaining money by false pretences, the false pretences being, that he was an unmarried man, that he would marry the prosecutrix, and that with the money she was to give him he would furnish a house for them to live in. Now, it is clear that a false promise cannot be the subject of an indictment for obtaining money by false pretences. Here, however, we have the pretence that he **was** an unmarried man. This was **false in fact,** and was essential, for without it he would not have obtained the money. Then this false fact by which the money is obtained will sustain the indictment, although it is united with two false promises, neither of which alone would have supported the conviction.

R. v. ARDLEY
(1871).
L. R. 1 C. C. R. 301; 40 L. J. M. C. 85.

A. went into the shop of a jeweller and asked him to purchase a watch chain. He said to the jeweller, "It is 15-carat fine gold and you will see it stamped on every link. It was made for me, and I paid nine guineas for it. The maker told me it was worth £5 to sell as old gold." The jeweller gave A. £5 for the chain, which though marked 15-carat on every link was in fact of 6-carat gold. The prisoner made false representations as to his reasons for selling the chain. On his arrest another similar chain was found on him. *Held*, that the statement that the chain

was 15-carat gold was not a statement as to a matter of opinion but a misrepresentation of a specific fact and therefore sufficient to support a conviction for obtaining by false pretences.

Bovill, C.J.—But the jury have . . . found that the prisoner, when he represented the chain to be 15-carat gold, knew this representation to be false, and the question whether the conviction can be supported upon that finding alone stands upon a somewhat different footing. The cases have drawn nice distinctions between matters of fact and matters of opinion, statements of specific facts and mere exaggerated praise. It is difficult for us, sitting here as a Court, to determine conclusively what is fact and what is opinion, what is a specific statement and what exaggerated praise. These are questions for the jury to decide. And the prisoner has this additional security, that the jury have to consider not only whether the statements made are statements of fact, but also whether they are made with the intention to defraud.

The case which has been most pressed upon us is *R.* v. *Bryan.* (*a*) The representation in that case was, that certain plated spoons were "equal to Elkington's A." *Primâ facie*, that representation would seem to be a mere matter of opinion, and the Court held that it was not sufficient to support the conviction. But many judges expressed the opinion that there might well be cases in which misrepresentations, though as to quality, would be within the statute. Cockburn, C.J., says: "If the person had represented these articles as being of Elkington's manufacture, when in point of fact they were not and he knew it, that would be an entirely different thing." Pollock, C.B., says: "I think if a tradesman or a merchant were to concoct an article of merchandise expressly for the purpose of deceit, and were to sell it as and for something very different even in quality from what it was, the statute would apply." It is plain that these learned judges considered that **a specific representation of quality, if known to be false, would be within the statute.** Coleridge, J., expressly concurs in the observations of Pollock, C.B. Erle, J., at the close of his judgment says: "No doubt it is difficult to draw the line between the substance of the contract and the praise of an article in respect of a matter of opinion; still it must be done, and

(*a*) D. & B. 265.

the present case appears to me not to support a conviction, upon the ground that there is no affirmation of a **definite triable fact** in saying the goods were equal to Elkington's A., but the affirmation is of what is mere matter of opinion, and falls within the category of untrue praise in the course of a contract of sale, where the vendor has in substance the article contracted for, namely plated spoons." Crompton, J., also considered that the statute applies "**when the thing sold is of an entirely different description from what it is represented to be.**" Willes, J., who dissented from the judgment of the Court, goes the whole length of saying that a representation as to quality, if known to be false, is enough to support a conviction. And Bramwell, B., leans to the same opinion.

Applying these observations to the present case, the statement here made is not in form an expression of opinion or mere praise. It is a distinct statement, accompanied by other circumstances, that the chain was 15-carat gold. That statement was untrue, was known to be untrue, and was made with intent to defraud. How does that differ from the case of a man who makes a chain of one material and fraudulently represents it to be of another? Therefore whether we look at the whole of the evidence, or only at that which goes to the quality of the chain, the conviction is good. The case differs from *Reg.* v. *Bryan* because **here there was a statement as to a specific fact within the actual knowledge of the prisoner, namely the proportion of pure gold in the chain.**

R. v. RHODES

(1898).

[1899] 1 Q. B. 77; 68 L. J. Q. B. 83.

R. was indicted for obtaining eggs by false pretences from W. Bays, the pretences being that he was carrying on business as a dairyman, that he required eggs for use in his business, and that he was in a position to pay for them. These pretences were contained in a newspaper advertisement purporting to be addressed from "Norfolk Farm Dairy, High Street, Mitcham, Surrey." Two witnesses, Elston and Chambers, proved that eggs had been obtained from them by a similar advertisement subsequently to the offence charged. *Held*, that this evidence was properly admitted.

Lord Russell of Killowen, C.J.—The second point for our consideration is whether the evidence of Elston and Chambers was admissible for the prosecution. The case is not as carefully and precisely stated as we could have wished; but it appears that there was a charge of obtaining eggs from one Bays by the false pretence that the prisoner was honestly carrying on such a business, and required eggs for the purposes of such a business; and the prisoner appears to have advertised for a considerable time in various newspapers his wants for eggs. The prosecution alleged that the business was in truth and in fact a "bogus" business, and that the prisoner was not in a position to pay for the eggs. The charge before the Court was of obtaining eggs by false pretences from Bays, as I have said, and it was necessary, therefore, to prove these false pretences as made to Bays; but Elston and Chambers were also called for the prosecution to prove that they had acted on the same advertisement, and had supplied eggs to the prisoner in separate transactions of a similar nature to that between the prisoner and Bays, and had been defrauded.

Here again we have to complain of the want of precision in the case. We are not told in the case when these transactions took place; but we are informed by counsel that both transactions were subsequent to the dealing with Bays in respect of which the prisoner was charged, and that one of the transactions took place as much as two months after that time.

It seems to me quite clear that, if the transactions with Elston and Chambers had taken place before that with Bays and at a period not too remote, the evidence of Elston and Chambers would have been admissible against the prisoner. Is that evidence admissible although the transactions were subsequent to the offence charged?

That depends, as it seems to me, on the question whether or not the case put forward for the prosecution was that the prisoner was not carrying on a real business, but that **the business** in which he was engaged **was from first to last a bogus or sham business.** If the prosecution merely alleged *isolated transactions* of a fraudulent character against the prisoner with no connection between them, I should certainly say that evidence of transactions which took place after the offence charged was not admissible, more especially

if such transactions took place two months after the offence. But here, as I have said, the charge to be made out was that of carrying on a bogus **business**; and on the whole I think that the evidence was admissible on the ground that it shewed **part of a scheme to defraud persons by the pretence of carrying on an honest and** *bonâ fide* **business.** The means by which the fraud was perpetrated was by advertisements in newspapers, which the prosecutor Bays and the witnesses Elston and Chambers alike saw and alike acted upon. **The transactions in all three cases were therefore connected** by the advertisement which formed part of the scheme.

R. v. COOPER

(1877).

2 Q. B. D. 510; 46 L. J. M. C. 219.

C. obtained potatoes from the prosecutor by the following letter:—

"Sir,—Please send me one truck of regents and one truck of rocks as samples, at your prices named in your letter; let them be of good quality, then I am sure a good trade will be done for both of us. I will remit you cash on arrival of goods and invoice. Yours, etc.

"P.S.—I may say that if you use me well I shall be a good customer."

Held, that the words of this letter were capable of conveying a pretence that C. was in a large way of business, that he was in a position to do a good trade in potatoes and that he could pay for large quantities of potatoes when delivered to him. *Held*, also, that it was a question for the jury whether C. intended the prosecutor to put that construction on the letter.

LUSH, J.—The question for our consideration is, was there evidence on which the jury could reasonably convict the prisoner of the offence charged? (i.e. of obtaining by false pretences). The pretences charged are that "he then was a dealer in potatoes, and as such dealer in potatoes then was in a large way of business," that he "then was in a position to do a good trade in potatoes," and that he "then was able to pay for large quantities of potatoes as and when the same might be delivered to him." The pretence in order to justify a conviction must be of existing facts. It may be made either by words, or by acts. **It is sufficient if it can be reasonably**

and naturally inferred from the words, or from the acts, in order to raise a question for the decision of the jury. It is not necessary that the words or that the acts should be capable, only, of the meaning charged by the indictment. If the words in the letter written by the prisoner in the present case were intended to mean, and are fairly capable of meaning, that which is charged, and if they were so understood, then there was as much a pretence as though the letter had contained a definition of their meaning. The words here are capable of supporting the pretences charged. Without further explanation this large quantity is asked for as a sample, and then the prisoner says he will remit, and talks of the trade to be done. The letter is fairly capable of representing and conveying to the mind of the reader that the defendant was a man dealing largely, and in a position to do a good trade, and remit at once on delivery. **The jury** have adopted this construction, and **have found that the prosecutor did so read the letter, and that the prisoner intended** it to be so read. I therefore think the conviction right.

R. v. DALE

(1836).

7 C. & P. 353.

The prosecutor took a filly to Brecon fair to sell. He there met the prisoner, who pretended that he was a gentleman's servant, living in Brecon, and that he would like to purchase the filly for his master. The prisoner further falsely alleged that he had bought twenty other horses at Brecon fair. The prosecutor sold the filly to the prisoner, who took it away, promising to come in half an hour to the "Cross Keys" and pay for it. The prisoner was indicted for obtaining the filly by the false pretences that he was a gentleman's servant, and lived at Brecon and had bought twenty horses at the fair. The prosecutor, however, in cross-examination stated that he did not part with the filly on account of these false pretences, but because he believed that the prisoner would call at the "Cross Keys" and pay him. *Held*, that if this was the case the prisoner could not be convicted.

COLERIDGE, J.—"The question for you to consider is, whether the prosecutor parted with his filly by reason of his having believed any false pretence made use of by the prisoner. It is sufficient for

the prosecutor to prove that any one of the pretences charged in the indictment was false, and that he parted with his filly by reason of such false pretence, the prisoner intending to defraud him thereby. However, in this case the prosecutor himself says that he parted with his filly because the prisoner promised to pay him, and not on account of any of the false pretences charged. If you think that that was so, you will acquit the prisoner." **Verdict**—Not guilty.

R. v. MILLS

(1857).

D. & D. 205.

M. was charged with obtaining money by false pretences. He was employed by the prosecutor to cut chaff and demanded and obtained payment for more than he had cut. The prosecutor had seen the prisoner add chaff to a heap which he had cut and knew that the pretence was false, but nevertheless paid the money demanded. *Held*, that the prisoner could not be convicted of obtaining by false pretences.

COCKBURN, C.J.—The test is, what is the **motive operating on the mind of the prosecutor** which induced him to part with his money? Here the prosecutor knew that the pretence was false; he had the same knowledge of its falseness as the prisoner. **It was not the false pretence,** therefore, **which induced the prosecutor to part with his money;** and if it is said that it was parted with from a desire to entrap the prisoner, how can it be said to have been obtained by means of the false pretences? (*a*)

R. v. BUTTON

(1900).

[1900] 2 Q. B. 597; 69 L. J. Q. B. 901.

B. sent to the secretary of an athletic meeting two forms of entry in the name of Sims, stating (as required by the rules) the performances of Sims in the last four races run by him. In consequence of this B. obtained a big start in two handicaps and being a better runner than Sims won both races easily. After the race B. again represented to the handicapper that

(*a*) Note, however, that in such a case the prisoner can be convicted of *attempting to obtain by false pretences.*

he was Sims. He did not however apply for either of the prizes. *Held*, that he was properly convicted of attempting to obtain property by false pretences.

MATHEW, J.—The questions to be decided in the present case were pure questions of fact, namely, whether the intention of the defendant, when he entered for the races, was to obtain the prizes, and whether he made the representations with that intention. It appears from the case that he pretended to be a man who had never won a foot-race, and he was handicapped on the faith of that statement, as is shewn by the evidence given by the handicapper; but it also appears from the case that his statement was false, for he had won races. Then it was suggested that he competed in the name of Sims, as it is put in the case, "for a lark"; but that question was for the jury, and they have negatived the suggestion. It was also contended that his coming in first in the races was owing to his own good running; but it was also owing, in part at least, to the false pretences, for by means of the false pretences he obtained a longer start than he would have had if his true name and performances had been known. It is also said that some other act had to be done in order to make the offence complete, and that he could not rightly be convicted because it was not shewn that he had applied for the prizes and that the criminal intention was exhausted. The argument is exceedingly subtle, but unsound. In fact he was found out before he had the opportunity of applying for the prizes, as no doubt he otherwise would have done. The pretences which the prisoner made were not too remote, and the conviction was good.

R. v. MARTIN

(1866).

L. R. 1 C. C. R. 56; 36 L. J. M. C. 20.

A. and B. entered into a contract under which A. was to build a van for B. A. was induced to undertake the contract by the false representations of B., and accordingly built and delivered the van. *Held*, that B. could be convicted of obtaining the van by false pretences, although it was not in existence when the contract was made.

BOVILL, C.J.—The question asked of us is whether the verdict was right upon the evidence. This we understand to mean whether there was evidence to go to the jury; and so understanding it we are all of opinion that there was. The objection urged upon us has been answered by my Brothers Willes and Blackburn in the course of the case; and it is obvious that there are many cases within the mischief of the statute where the thing obtained is not in existence when the false pretence is made. Thus a man by false pretences may induce a tailor to make and send him a coat or a friend to lend him money, which may consist of bank-notes not printed when the false pretence was made on which the loan was granted. So also a man might obtain coals which were not got, and therefore not a chattel in the eye of the law, at the time of making the pretence. It is absurd to say that the chattel obtained must be in existence when the pretence is made. The pretence must, indeed, precede the delivery of the thing obtained; but at what distance of time? What is the test? Surely this, that **there must be a direct connection between the pretence and delivery**—that **there must be a continuing pretence.** Whether there is such a connection or not is a question for the jury. In *Gardner's Case* (*a*) the prisoner obtained, at first, lodgings only, and after he had occupied the lodgings more than a week, he obtained board; and it was held that the false pretence was exhausted by the contract for lodging, the obtaining board not having apparently been in contemplation when the false pretence was made. It is true that in *Bryan's Case* (*b*) the contract was for board as well as lodging; but there the indictment was for having obtained sixpence as a loan some time after the contract for board and lodging had been entered into; and it is clear that the obtaining the loan was as remote from the false pretence under which the contract for board and lodging had been entered into, as the obtaining of the board was from the false pretence in *Gardner's Case.* In the present case, when the false pretence was made and the order given, it was never contemplated that the matter should rest there; and we have no difficulty in holding that there was a continuing pretence, and a delivery obtained thereby.

WILLES, J.—I will only add that, since the cases of *R.* v. *Abbot* (*c*)

(*a*) D. & B. 40. (*b*) 2 F. & F. 567. (*c*) 1 Den. 273.

and *R.* v. *Burgon*, (*d*) it is impossible to contend seriously that the case is not within the statute because the chattel is obtained under a contract induced by the false pretence.

R. v. FISHER

(1910).

[1910] 1 K. B. 149 ; 79 L. J. K. B. 187.

A. was convicted of obtaining a pony and cart by false pretences. He had represented that he wanted to buy them for his wife who was delicate, and that he would give £2 for the hire of them for a week if he did not buy them. He had as security given a bill for £25, which was dishonoured, and he had also made false pretences as to his banking account. At the trial evidence was given that he had on another occasion obtained provender by the pretence that he was carrying on a milk business, and on a third occasion by the pretence that he was in the fish trade. *Held*, that the evidence was wrongly admitted and that, as it might have influenced the jury, it must be set aside.

CHANNELL, J.—**The principle is that the prosecution are not allowed to prove that a prisoner has committed the offence with which he is charged by giving evidence that he is a person of bad character and one who is in the habit of committing crimes, for that is equivalent to asking the jury to say that because the prisoner has committed other offences he must therefore be guilty of the particular offence for which he is being tried. But if the evidence of other offences does go to prove that he did commit the offence charged, it is admissible because it is relevant to the issue, and it is admissible not because, but notwithstanding that, it proves that the prisoner has committed another offence.** For example, on a charge of embezzlement, if the defence is that the failure to account for money is due to a mistake on the part of the prisoner, evidence is admissible to prove other instances of the same kind, because that evidence tends to prove that in the particular case the prisoner had not made a mistake. Another instance is where a person obtains goods by paying for them with a cheque which is subsequently dishonoured, in which case evidence is admissible to prove other

(*d*) D. & B. 11.

cases in which the prisoner has obtained goods by cheques which were dishonoured. In other words, whenever it can be shewn that the case involves a question as to there having been some mistake or as to the existence of a system of fraud, it is open to the prosecution to give evidence of other instances of the same kind of transaction notwithstanding that the evidence goes to prove the commission of other offences, in order to negative the suggestion of mistake or in order to shew the existence of a systematic course of fraud. Applying these principles to this case, the charge here is that the prisoner obtained the pony and cart from the prosecutor by making certain statements. The falsity of those statements is not proved by giving evidence that in other cases the prisoner made other false statements, though it does tend to shew that the prisoner was a swindler. But there is no rule of law that swindling is, as regards proof, different from any other offence, and if a man is charged with swindling in a particular manner, his guilt cannot be proved by shewing that he has also swindled in some other manner. We are of opinion that the evidence as to the other cases was inadmissible in this case because it was not relevant to prove that he had committed the particular fraud for which he was being charged, in that it only amounted to a suggestion that he was of a generally fraudulent disposition. On the other hand, **if all the cases had been frauds of a similar character, shewing a systematic course of swindling by the same method, then the evidence would have been admissible.**

R. v. KILHAM

(1870).

L. R. 1 C. C. R. 261 ; 39 L. J. M. C. 109.

K. by means of false pretences induced the prosecutor to let him a horse for a day. The hire of the horse was never paid by K. *Held*, that he could not be convicted of obtaining goods by false pretences.

Bovill, C.J.—We are of opinion that the conviction in this case cannot be supported. The statute 24 & 25 Vict. c. 96, s. 88, enacts that, "whosoever shall, by any false pretence, obtain from any other person any chattel, money, or valuable security, with intent

to defraud, shall be guilty of a misdemeanour." **The word "obtain" in this section does not mean obtain the loan of, but obtain the property in, any chattel, etc.** This is, to some extent, indicated by the proviso, that if it be proved that the person indicted obtained the property in such manner as to amount in law to larceny he shall not, by reason thereof, be entitled to be acquitted; but, it is made more clear by referring to the earlier statute from which the language of s. 88 is adopted. 7 & 8 Geo. IV, c. 29, s. 53, recites that "a failure of justice frequently arises from the subtle distinction between 'larceny and fraud'" and, for remedy thereof, enacts that "if any person shall, by any false pretence, obtain," etc. The subtle distinction which the statute was intended to remedy was this: that if a person by fraud induced another to part with the possession only of goods and converted them to his own use, this was larceny; while, if he induced another by fraud to part with the property in the goods as well as the possession this was not larceny. (*a*)

But to constitute an obtaining by false pretences it is equally essential, as in larceny, that there shall be an intention to deprive the owner wholly of his property and this intention did not exist in the case before us. In support of the conviction the case of *R.* v. *Boulton* (*b*) was referred to. There the prisoner was indicted for obtaining, by false pretences, a railway ticket with intent to defraud the company. It was held that the prisoner was rightly convicted, though the ticket had to be given up at the end of the journey. The reasons for this decision do not very clearly appear, but it may be distinguished from the present case in this respect: that the prisoner, by using the ticket for the purpose of travelling on the railway, entirely converted it to his own use for the only purpose for which it was capable of being applied. In this case the prisoner never intended to deprive the prosecutor of the horse or the property in it, or to appropriate it to himself, but only intended to obtain the use of the horse for a limited time.

(*a*) See the cases on this subject, II *Russell on Crimes*, 200, 4th edit., and note (*d*), p. 664.

(*b*) 1 Den. C. C. 508; 19 L. J. (M. C.) 67.

R. v. LATIMER

(1886).

17 Q. B. D. 359; 55 L. J. M. C. 135.

The prisoner was convicted under s. 20 of the Offences against the Person Act, 1861, of "unlawfully and maliciously wounding" a woman named Rolston. He had quarrelled in a public-house with a man named Chapple, at whom he had aimed a blow with his belt. The belt had however glanced off Chapple and severely wounded the woman Rolston, who was sitting by his side. *Held*, that the prisoner was rightly convicted.

COLERIDGE, C.J.—We are of opinion that this conviction must be sustained. It is common knowledge that **a man who has an unlawful and malicious intent against another, and, in attempting to carry it out, injures a third person, is guilty of what the law deems malice against the person injured, because the offender is doing an unlawful act, and has that which the judges call general malice, and that is enough.** Such would be the case if the matter were *res integra*; but it is not so, for *R.* v. *Hunt* (*a*) is an express authority on the point. There a man intended to injure A., and said so, and in the course of doing it stabbed the wrong man, and had clearly malice in fact, but no intention of injuring the man who was stabbed. He intended to do an unlawful act, and in course of doing it the consequence was that somebody was injured. But the words of the statute under which the prisoner is indicted carry the case against him further still, because 24 & 25 Vict. c. 100, s. 18, enacts that "whosoever shall unlawfully and maliciously cause any grievous bodily harm to any person" with malicious intent shall be guilty of felony; then s. 20 leaves out the intent, and says, "whosoever shall unlawfully and maliciously wound or inflict any grievous bodily harm upon any other person . . . shall be guilty of a misdemeanour." The language of s. 18 and of s. 20 is different and the present conviction is under s. 20 and not under s. 18.

The Master of the Rolls has pointed out to me that these sections are in substitution for and in correction of the earlier statutes, in which the unlawful act must be done with intent to injure "such person," making it necessary that the intent should be against the

(*a*) 1 Moo. C. C. 93.

person injured, whereas in 24 & 25 Vict. c. 100 the words "such person" are left out, for s. 18 says "any person" and s. 20 "any other person." So but for *R.* v. *Pembliton* (*b*) there would not have been the slightest difficulty. Does that case make any difference? I think not, and, on consideration, that it was rightly decided. But it is clearly distinguishable, because the indictment in *R.* v. *Pembliton* was on the Act making unlawful and malicious injury to property a statutory offence punishable in a certain way, and the jury expressly negatived, and the facts expressly negatived, any intention to do injury to *property*, and the Court held that under the Act making it an offence to injure any property there must be an intent to injure *property*. *R.* v. *Pembliton* therefore does not govern the present case, and on no other ground is there anything to be said for the prisoner.

Bowen, L.J.—I am of the same opinion. It is quite clear that the act was done by the prisoner with malice in his mind. I use the word "malice" in the common law sense of the term, viz. **a person is deemed malicious when he does an act which he knows will injure either the person or property of another.** The only case that could be cited for the prisoner is *R.* v. *Pembliton*, which was founded—not upon malice in general—but upon *a particular form of malice*, viz. malicious injury to property; and the Court held that though the prisoner might have been acting maliciously in the common law sense of the term, he was not malicious in the sense of the Act directed against malicious injury to property. That decision does not apply to a case under the Act where the indictment is for injury to the person. *R.* v. *Pembliton* might have been ground for an argument of some plausibility if the prisoner meant to strike at a pane of glass and had hit a person. It might have been that the malice in that case was not enough. But when, as here, an intent to injure a person is proved, that is enough.

Lord Esher, M.R.—I am of the same opinion. The only case which could be cited against the well-known principle of law applicable to this case was *R.* v. *Pembliton*, but on examination it is found to have been decided on this ground, viz. that there was no intention to injure any property at all. It was not a case of attempting to

(*b*) L. R. 2 C. C. R. 119.

injure one man's property and injuring another's, which would have been wholly different.

R. v. MARTIN

(1882).

8 Q. B. D. 54; 51 L. J. M. C. 36.

At the end of a performance in a theatre the prisoner, with the intent of frightening persons leaving the gallery, put out the lights on the staircase and placed a bar across a door through which they had to go. In consequence of the panic thus caused there was a struggle on the staircase in which several persons were injured. *Held*, that the prisoner was guilty of unlawfully and maliciously inflicting bodily harm upon the persons injured.

Lord Coleridge, C.J.—I am unable to entertain any doubt as to the propriety of this conviction. The prisoner was indicted under 24 & 25 Vict. c. 100, s. 20, which enacts that "whosoever shall unlawfully and maliciously wound, or inflict any grievous bodily harm upon any other person, either with or without any weapon or instrument, shall be guilty of a misdemeanour, etc." The learned judge after stating the facts continued: Upon these facts the prisoner was convicted, and the jury found all that was necessary to sustain the conviction. **The prisoner must be taken to have intended the natural consequences of that which he did. He acted "unlawfully and maliciously" not that he had any personal malice against the particular individuals injured, but in the sense of doing an unlawful act calculated to injure, and by which others were in fact injured.** Just as in the case of a man who unlawfully fires a gun among a crowd, it is murder if one of the crowd is thereby killed. The prisoner was most properly convicted.

Stephen, J.—I am entirely of the same opinion, but I wish to add that the Recorder seems to have put the case too favourably for the prisoner, for he put it to the jury to consider whether the prisoner did the act "as a mere piece of foolish mischief." **Now it seems to me that if the prisoner did that which he did as a mere piece of foolish mischief unlawfully and without excuse he did it "wilfully," that is "maliciously" within the meaning of the statute.** I think

it important to notice this as the word "malicious" is capable of being misunderstood. Lord Blackburn in the cases of *R.* v. *Ward* (*a*) and *R.* v. *Pembliton* (*b*) lays it down that **a man acts "maliciously" when he wilfully and without lawful excuse does that which he knows will injure another.**

R. v. PEMBLITON

(1874).

L. R. 2 C. C. R. 121; 43 L. J. M. C. 91.

The prisoner was convicted under s. 51 of the Malicious Damage Act, 1861, of "unlawfully and maliciously" committing damage. He had thrown a stone at some persons with whom he had been fighting in the street and missing them had broken a window. The jury found that he threw the stone intending to strike some person and not intending to strike the window. *Held*, that as the finding of the jury negatived the existence of malice the conviction must be quashed.

Lord Coleridge, C.J.—The facts of the case are that there was fighting going on in the streets of Wolverhampton near the prosecutor's house, and the prisoner, after fighting some time, separated himself from the crowd and threw a stone, which missed the person he aimed at, but struck and broke a window, doing damage to the extent of upwards of £5. The question is, whether under an indictment when coupled with the other facts found by the jury that the prisoner threw the stone at the people intending to strike one or more of them, but not intending to break a window. I am of opinion that the evidence does not support the conviction. The indictment is under the 24 & 25 Vict. c. 97, s. 51, which deals with malicious injuries to property, and the section expressly says that the act is to be unlawful and malicious. There is also the 58th section, which makes it immaterial whether the offence has been committed from malice against the owner of the property or otherwise, that is, from malice against someone not the owner of the property. In both these sections it seems to me that **what is intended by the statute is a wilful doing of an intentional act.** Without saying that if the case had been left to them in a different way the

(*a*) L. R. 1 C. C. R. 356. (*b*) L. R. 2 C. C. R. 122.

conviction could not have been supported, if on these facts the jury had come to a conclusion that the prisoner was reckless of the consequence of his act, and might reasonably have expected that it would result in breaking the window, it is sufficient to say that **the jury have expressly found the contrary.** I do not say anything to throw doubt on the rule under the common law in cases of murder which has been referred to, but the principles laid down in such case have no application to the statutable offence we have to consider.

BLACKBURN, J.—I am of the same opinion. We have not now to consider what would be malice aforethought to bring a given case within the common law definition of murder; here the statute says that the act must be unlawful and malicious, and malice may be defined to be "where any person wilfully does an act injurious to another without lawful excuse." **Can this man be considered, on the case submitted to us, as having wilfully broken a pane of glass? The jury might perhaps have found on this evidence that the act was malicious, because they might have found that the prisoner knew that the natural consequences of his act would be to break the glass, and although that was not his wish, yet that he was reckless whether he did it or not; but the jury have not so found, and I think it is impossible to say in this case that the prisoner has maliciously done an act which he did not intend to do.**

R. v. CHILD

(1871).

L. R. 1 C. C. R. 307; 40 L. J. M. C. 127.

By s. 7 of the Malicious Damage Act, 1861, it is a felony unlawfully and maliciously to set fire to any goods in a building "under such circumstances that if the building were thereby set fire to the offence would amount to felony." The prisoner from ill-will against the prosecutrix broke up her furniture in the kitchen of her lodgings and set fire to it. The house would have ignited had not the fire been put out very soon. The jury found that the prisoner was guilty, but not so that if the house had caught fire the setting fire to the house would have been wilful and malicious. *Held*, that the prisoner could not be convicted of felony under s. 7.

BOVILL, C.J.—The question reserved in this case is as to the construction of 24 & 25 Vict. c. 97, s. 7, which enacts that "whosoever

shall unlawfully and maliciously set fire to any matter or thing being in, against, or under any building, under such circumstances that, if the building were thereby set fire to, the offence would amount to felony, shall be guilty of felony." The indictment was framed in the terms of this section. The evidence was that the prisoner, from ill-will and malice against the owner of goods in a house, set fire to those goods under such circumstances that the house would almost certainly have been burned if the fire had not been extinguished. But, in fact, the house was not set on fire. Upon these facts the learned judge left it to the jury to say whether, if the house had caught fire, the setting fire to it would have been malicious and with intent to injure. And he told them that if they thought the prisoner was aware that what he was doing would probably set the building on fire, and so necessarily injure the owner, and was at best reckless whether it did so or not, they ought to find that if the house had caught fire the offence would have been felony. The jury found the prisoner guilty, but not so that if the house had caught fire the setting fire to it would have been wilful and malicious. By that finding I think they negatived the whole of what the learned judge left to them, and found, in effect, that the prisoner was not aware that what he was doing would probably set fire to the house, and so injure the owner, and was not reckless whether it did so or not. **The only finding of the jury,** therefore, **is that the goods were set on fire with intent to injure the owner of the goods.** Now, there is no section in the Act which makes the wilful and malicious setting fire to goods felony. The only section which could be applicable to the case is s. 7 ; and if we were to hold the case to be within that section we should be rejecting the words "under such circumstances that if the building were thereby set fire to the offence would amount to felony." I think that, to come within those words, the facts must have some relation to the house ; and that they point to circumstances under which, if the house caught fire, the offence would fall within some of the earlier sections of the Act. But the case does not fall within any of them. **It is a simple case of wilfully and maliciously setting fire to goods, and no more felony than setting fire to a box of matches on a stone floor.**

BLACKBURN, J.—I am of the same opinion. I reserved the

question for this Court, because I thought the framers of the section in question intended to include this case. But they have failed to express their intention. The earlier enactment, 14 & 15 Vict. c. 19, s. 8, made it felony wilfully and maliciously to set fire to goods "being in any building the setting fire to which is made felony, etc." And under those words the prisoner might have been convicted of felony under both counts. But the consolidating Act uses different words. It speaks of setting fire to goods in a building "under such circumstances that if the building were thereby set fire to, the offence would amount to felony." It appears from W. Greaves' note, in his edition of the Consolidation Acts (p. 165), that this change of language was deliberate. His opinion is, that if you set fire to one thing under such circumstances that you are likely thereby to set fire to another thing, then if the setting fire to the one is malicious the setting fire to the other is too: "Russell on Crimes," vol. 1, p. 742, note (*b*), 4th ed. If that is good law, then the setting fire to the house here, if it had caught fire, would have been felony. But it is not law, and the framers of the Act have failed to express the meaning that they intended to express.

R. v. RILEY

(1896).

[1896] 1 Q. B. 309; 65 L. J. M. C. 74.

By s. 38 of the Forgery Act, 1861, it is a felony to demand or obtain money by any "forged instrument." R., a post-office clerk, sent to a bookmaker a telegram betting on a horse for a certain race. The telegram purported to have been handed in at a branch office at Manchester at 2.40 P.M. and to have been received at the head office for transmission to the prosecutor at 2.51. The race was run at 2.45. In reality the telegram was never handed in at any branch office, but was despatched by the prisoner from the head office after learning the result of the race. The bookmaker believing that the telegram was handed in at 2.40 accepted the bet and, the horse having won, credited R. with his winnings. *Held*, that the telegram was a forged instrument under s. 38 of the Forgery Act, 1861.

HAWKINS, J.—In IV "Blackstone's Commentaries," 247, **forgery** at common law is defined as **"the fraudulent making or alteration of a writing to the prejudice of another man's right."** I seek for no

other definition for the purposes of the present discussion. That a postal telegram is a writing is to my mind clear. It originates in a written message addressed and signed by the sender, and delivered by him into the post-office of despatch for the express purpose that it shall, in the very words in which it is penned, be transmitted by means of an electric wire to another post-office, which I will call the arrival office, and that it shall there again on its arrival be committed to writing *verbatim et literatim*, and that such last-mentioned writing shall be handed to the person to whom it is addressed. The writing delivered in at the office of despatch is the authority of the postmaster at the arrival office to commit it to writing and to deliver it to the addressee as the sender's written message to him. This message sent from the arrival office is, in my opinion, as binding upon the sender as though he had written it with his own hand. If I am right in this, it follows that an offer by telegram accepted by telegram might well create a contract sufficient to satisfy the Statute of Frauds between the sender and the addressee, and a verbal offer accepted by telegram might create an ordinary contract. For this there is the authority of the Court of Common Pleas so long ago as 1870 : see *Godwin* v. *Francis*. (*a*)

Assuming the telegram to be such a writing as I have stated, a bare reading of the contents of it, coupled with the admission of its falsity and of the purpose for which it was made, are overwhelming to establish that it was fraudulently made to the prejudice of another man's right, and thus a forgery at common law. For this I need only cite the judgment of Blackburn, J., in *R.* v. *Ritson* : (*b*) " When an instrument professes to be executed at a date different from that at which it really was executed, and the false date is material to the operation of the deed, if the false date is inserted knowingly and with a fraudulent intent, it is a forgery at common law." The more vexed questions, however, are whether the writing can be treated as an instrument, and, if so, whether it is such an instrument as is contemplated by the 38th section, the contention for the prisoner being that it cannot properly be treated as an instrument at all, and that, even if it can, that the 38th section has reference only to such forged legal or commercial instruments as are

(*a*) L. R. 5 C. P. 295. (*b*) L. R. 1 C. C. R. 200 at p. 204.

mentioned and the forgery of which is made felony in the earlier sections of the statute. After much consideration, I have formed an opinion adverse to the prisoner on both these points.

Now can this telegram properly be called an instrument? I am not aware of any authority for saying that in law the term "instrument" has ever been confined to any definite class of legal documents. . . . It will not, of course, be denied that there are many instruments of an important character, commercial and otherwise, the forgery of which constitutes only offences at common law. I do not, for instance, find that the forgery of an ordinary written contract (not under seal or specially named in the statute) is a felony. So also a certificate of ordination, though the forgery of it is a mere common law offence, was nevertheless spoken of as an instrument by Blackburn, J., in *R.* v. *Morton*. (*c*) I call attention to these undeniable facts for the purpose of shewing that there are many written documents of an important character beyond those mentioned in s. 38 to which the words "any instrument whatsoever" used in that section apply in addition to those documents mentioned in the statute.

In my view of the case, the telegram in question is an *instrument of contract*; it is the instrument which completed the wager offered by Crompton and Radcliffe to those who were able and disposed to accept it (see *Carlill* v. *Carbolic Smoke Ball Co., Ltd.*, (*d*) and the case there cited), and thenceforth an obligation was imposed upon each party in honour to fulfil it according to the result of the race. I say *in honour*, because, though it was clearly not an illegal contract, it could not be enforced by any legal process. In virtue of it and upon the assumption that the telegram was what it purported to be, Messrs. Crompton and Radcliffe paid the £9.

Assuming the document to be an "instrument," I come to the only remaining question, whether it is such within the meaning of s. 38 of the statute. Why should it not be so? It is contended that the section has reference only to such instruments as are mentioned in the earlier sections of the statute, and that s. 38 applies only to those forged instruments which are punishable as felonies.

Such a construction is, I think, erroneous. There is no definition

(*c*) L. R. 2 C. C. 22. (*d*) [1892] 2 Q. B. 484; [1893] 1 Q. B. 256.

of the word "instrument" in the statute to fetter us in giving to it the ordinary and general interpretation. It was clearly the intention of the Legislature by s. 38 to create a new offence.

If it had been the intention of the Legislature to limit the operation of the section to felonious forgeries how easy it would have been to use appropriate language for that purpose.

So far from doing this, the Legislature, having used the term "instrument" in a variety of senses all falling within one or another of the definitions I have above referred to, proceeds, in s. 38, to use language which read in its ordinary sense comprises *every description of written instrument.* What simpler, stronger, or more comprehensive words could they have employed than "*any forged* or altered instrument *whatsoever*" to convey an intention that *every forged* instrument should be covered by it, whether the forgery was a felony by statute or a misdemeanour at common law?

R. v. WILLIAM RITSON AND SAMUEL RITSON

(1869).

L. R. 1 C. C. R. 203; 39 L. J. M. C. 10.

A. and B. fraudulently antedated a deed of conveyance in order to give it priority over a subsequent conveyance. *Held*, that they were guilty of forgery.

BLACKBURN, J.—By 24 & 25 Vict. c. 98, s. 20, it is felony to "forge" any deed with intent to defraud. The material word in this section is "forge." There is no definition of "forge" in the statute, and we must therefore inquire what is the meaning of the word. The definition in Comyns (Dig., tit. "Forgery" A.I.) is: "**forgery is where a man fraudulently writes or publishes a false deed or writing to the prejudice of the right of another**"—not making an instrument containing that which is false—which, I agree with Mr. Torr, would not be forgery—but making an instrument which purports to be that which it is not. Bacon's Abr. (tit. "Forgery," A.), which, it is well known, was compiled from the MS. of Chief Baron Gilbert, explains forgery thus: "The notion of forgery doth not so much consist in the counterfeiting of a man's hand and seal . . . but in the

endeavouring to give an appearance of truth to a mere deceit and falsity, and either to impose that upon the world as the solemn act of another which he is in no way privy to, or at least to make a man's own act appear to have been done at a time when it was not done, and by force of such a falsity to give it an operation which in truth and justice it ought not to have." The material words, as applicable to the facts of the present case, are "to make a man's own act appear to have been done at a time when it was not done." **When an instrument professes to be executed at a date different from that at which it really was executed, and the false date is material to the operation of the deed, if the false date is inserted knowingly and with fraudulent intent, it is a forgery at common law.**

Ordinarily the date of a deed is not material, but it is here shewn by extrinsic evidence that the date of the deed was material. Unless the deed had been executed before the 5th May it could not have conveyed any estate in the land in question. The date was of the essence of the deed, and as a false date was inserted with a fraudulent intent the deed was a false deed, within the definition in Bacon's Abridgment. This is a sufficient authority.

If, however, there were no authority, I think that the principle I have mentioned is right and expedient. Besides this, however, Coke (3 Inst. 169), speaking of forgery before the statute of 5 Eliz. c. 14, states that the principle of forgery does apply to a case like this, and that to make a deed purporting to bear a false date may be a forgery. To the same effect is Sir M. Foster in *Lewis's Case* (Foster's "Crown Cases," 116), where all the judges in consultation assumed that antedating a deed might be forgery.

All the text books agree, and there is no single authority against the definition I have stated. Mr. Torr, however, says that the definition is old. I think that this gives it all the greater weight.

R. v. MARTIN

(1880).

5 Q. B. D. 36; 49 L. J. M. C. 11.

Robert Martin met Lee, to whom he had been for many years well known, and agreed to buy from him a pony and carriage. Martin in the presence

of Lee produced a form of cheque, and filled it in, signing it with the name of *William* Martin. Lee took it without looking at it or noticing the signature. The cheque was drawn on bankers with whom Martin formerly had an account in his proper name of Robert Martin, but the account was now closed and accordingly on presentation of the cheque payment was refused. *Held*, that Martin was not guilty of forgery.

[Case reserved by COCKBURN, C.J.]—"The prisoner in drawing this cheque and delivering it to the prosecutor did not do so in the name of, or as representing any other person, real or fictitious. The cheque was drawn and uttered as his own, and it was so received by the prosecutor, to whom the prisoner was perfectly well known as an acquaintance of twenty years' standing, and by whom he was seen to sign it. The prisoner did not obtain credit with the prosecutor by substituting the Christian name of William for that of Robert. He would equally have got credit had he signed his proper name of Robert. **The credit was given to the prisoner himself, not to the name in which the cheque was signed; the cheque was taken as that of the individual person who had just been seen to sign it, not as the cheque of Wm. Martin, as distinguished from Robt. Martin, or of any other person than the prisoner.** On the contrary, if the prosecutor, who knew the prisoner's name to be Robert, had observed that the signature was in the name of William, he would in all probability have suspected something wrong, and would have refused to take the cheque.

"There was nothing whatever from which the motive of the prisoner in signing a wrong Christian name could be gathered. There happened indeed to be a Wm. Martin, a customer of the bank; but this was unknown to the prisoner; besides which, as the prisoner was perfectly aware that his person and true name were well known to the prosecutor, it could not be supposed that he intended to pass himself off as, or the cheque as, the cheque of any William Martin other than himself. The only motive which has occurred to my mind as one which might have induced him to sign a false Christian name is, that he may have thought that by so doing he might avoid being liable on the cheque when payment had been, as it was certain to be, refused. This, however, amounts to no more than conjecture. Be it as it may, and whatever may have been the motive, it occurred to me that while there had been a fictitious signature to the cheque

in question, so far as the Christian name was concerned, yet the signature having been affixed by the prisoner, and the cheque delivered by him as his own, though there had been a signature in a fictitious name, the name could not be said to be that of a fictitious person, and that in this respect the case did not fall within the principle of the cases in which it has been held that the use of the pretended name of a fictitious person amounts to forgery. I have therefore sought the assistance of the Court as to whether, under the circumstances, the affixing a fictitious Christian name to this cheque by the prisoner amounts to forgery as charged in the indictment."

No counsel appeared to argue the case.

HAWKINS, J., referred to *Dunn's Case.* (*a*)

COCKBURN, C.J.—The case is concluded by authority. In *Dunn's Case,* (*a*) 1 Lea C. C., it was agreed by the judges that "in all forgeries **the instrument supposed to be forged must be a false instrument in itself**; and that **if a person give a note entirely as his own, his subscribing it by a fictitious name will not make it a forgery,** the credit there being wholly given to himself, without any regard to the name, or any relation to a third person." Upon authority, as well as upon principle, it is clear that this conviction should be quashed.

R. v. GEACH

(1840).

9 C. & P. 504.

G. sent to his bankers a bill of exchange on which he had forged an acceptance. The bankers believing the acceptance to be genuine discounted the bill. G. was indicted for forging and uttering. *Held,* that it was no defence that he intended to pay or that he had in fact paid the bill.

PARKE, B.—Upon the questions, whether the acceptance is a forgery, and whether the prisoner knew it to be so, there can be no question, if you believe the evidence of Mr. Edmund Williams; and with respect to the intent to defraud, I have no doubt that you will take the law from me, which is this, that a person is guilty of

(*a*) 1 Lea C. C. 59.

forgery notwithstanding he may himself intend ultimately to take up the bill, and may suppose that the party whose name is forged will be no loser. If in the present case you are satisfied that the prisoner knew this acceptance to be forged, and uttered it as true, and believed that the bankers would advance money on it, which they would not otherwise do, that is ample evidence of an intent to defraud, and evidence upon which a jury ought to act. It appears that this bill has since been paid by the prisoner; but that will make no difference if the offence has been once completed at the time of the uttering.

R. v. WILLIAM SMITH, THOMAS SMITH, AND SARAH SMITH

(1827).

2 C. & P. 448.

George Smith was a bedridden idiot of about forty years of age, who lived with the prisoners, his brothers and sister. As a result of their negligence he died from cold and exposure and the prisoners were indicted for manslaughter. *Held*, that *in the absence of any evidence that the deceased was under the care, custody and control of the prisoners* there was no legal obligation upon the prisoners to maintain him merely because of their relationship to him.

BURROUGH, J.—I expected to have found in the will of the father that the defendants were bound, if they took the father's property, to maintain this brother; but under the will they are only bound to pay him £50 a year, and not bound to maintain him. William Smith appears to have been the owner of the house and Thomas and Sarah were mere inmates of it, as their idiot brother might be: as to these latter, there could clearly be no legal obligation on them; and how can I tell the jury that either of the defendants had such a care of this unfortunate man as to make them criminally liable for omitting to attend him? There is strong proof that there was some negligence; but my point is, that **omission, without a duty, will not create an indictable offence**. There is a deficiency of proof of the allegation of care, custody, and control, which must be taken to be legal care, custody, and control. Whether an indict-

ment might be so framed as to suit this case I do not know; but on this indictment I am clearly of opinion that the defendants must be acquitted.

R. v. INSTAN

(1893).

[1893] 1 Q. B. 450.

The prisoner, a woman between thirty and forty, with no occupation and no means of her own, lived with her aunt, a woman of seventy-three. The aunt during the last ten days of her life suffered from a disease which rendered her incapable of doing anything for herself. The prisoner took in the food supplied by the tradespeople, but gave no food to her aunt and provided no medical assistance. The aunt died from disease accelerated by want of food, nursing, and medical attendance. *Held*, that the prisoner was properly convicted of manslaughter.

Lord Coleridge, C.J.—It would not be correct to say that every moral obligation involves a legal duty; but every legal duty is founded on a moral obligation. A legal common law duty is nothing else than the enforcing by law of that which is a moral obligation without legal enforcement. There can be no question in this case that it was the clear duty of the prisoner to impart to the deceased so much as was necessary to sustain life of the food which she from time to time took in, and *which was paid for by deceased's own money for the purpose of the maintenance of herself and the prisoner*; it was only through the instrumentality of the prisoner that the deceased could get the food. **There was, therefore, a common law duty imposed upon the prisoner** which she did not discharge. Nor can there be any question that the failure of the prisoner to discharge her legal duty at least accelerated the death of the deceased, if it did not actually cause it. There is no case directly in point; but it would be a slur upon and a discredit to the administration of justice in this country if there were any doubt as to the legal principle or as to the present case being within it. The prisoner was under a moral obligation to the deceased from which arose a legal duty towards her; that legal duty the prisoner has wilfully and deliberately left unperformed, with the consequence that there has been an

acceleration of the death of the deceased owing to the non-performance of that legal duty. It is unnecessary to say more than that upon the evidence this conviction was most properly arrived at.

R. v. BULL
(1839).
9 C. & P. 22.

The prisoner was indicted for the murder of William Rushbrooke. The deceased was one of a party of six persons who had been drinking together at several public-houses. Going home they met the prisoner on the highway between 12 and 1 o'clock at night. A scuffle of some kind took place and the prisoner stabbed the deceased. The plea set up on his behalf was that he acted in self-defence.

VAUGHAN, J., in his summing up, said, that it was not justifiable homicide unless there was an intention on the part of the deceased and his companions to rob or murder the prisoner, or to do some dreadful bodily injury to him; and that it was not the law that a man would be justified in taking away the life of another, merely because he feared that he might be assaulted, or indeed, if he were actually assaulted. His Lordship told the jury that the question for their consideration was whether the conduct of the party made it **necessary** for the prisoner to inflict that blow which almost immediately terminated in the death of the deceased—whether he inflicted the wound in self-defence, to save his own life, which was in danger, or to protect himself from some dreadful bodily injury.

R. v. SCULLY
(1824).
1 C. & P. 319.

The prisoner was indicted for manslaughter. He had been set to watch his master's garden and seeing a man on the garden wall in the night hailed him. The man on the wall called out to another man whom the prisoner could not see, "Tom, why don't you fire." The prisoner hailed again and the man on the wall said, "Shoot and be d——d." The prisoner then fired at the man on the wall, but missed him and shot the other man.

GARROW, B.—Any person set by his master to watch a garden or yard is not at all justified in shooting at or injuring in any way persons who may come into those premises, even in the night, and if he saw them go into his master's hen-roost, he would still not be justified in shooting them. He ought first to see if he could not take measures for their apprehension. But here the life of the prisoner was threatened, and **if he considered his life in actual danger,** he was justified in shooting the deceased as he had done; but if not considering his own life in danger, he rashly shot this man who was only a trespasser, he would be guilty of manslaughter.

R. v. SMITH

(1837).

8 C. & P. 160.

A dispute arose in a public-house between the prisoner and a man named Chaplin, The prisoner and his brother left the public-house and were followed by Chaplin, who said that if he caught them he would serve them out. A scuffle between the parties took place in an adjoining mews, and Chaplin was in some way stabbed by a bayonet which the prisoner's brother was wearing. The evidence tended to shew that Chaplin attacked the prisoner and his brother and was stabbed by the prisoner. It was, however, suggested that the bayonet was knocked out of its sheath during the scuffle and that Chaplin fell upon it.

BOSANQUET, J. (in summing up).—The prisoner stands charged upon the coroner's inquisition with the crime of murder, and is also indicted for the lesser offence of manslaughter. The question for you, on a careful consideration of the whole of the evidence, will be, whether he was guilty of either the one or the other, or whether the circumstances of the case were such as to entitle him to an acquittal; whether he is guilty of murder or of manslaughter or whether his act was justifiable or excusable. Upon the question whether it amounts to murder you will have to consider this: Did the prisoner enter into the contest with an unarmed man, intending to avail himself of a deadly weapon? for if he did, it will amount to murder. But, if he did not enter into the contest with the intention of using it, then the question will be, did he use it in the heat of passion, in consequence of an attack made upon him? If he did then it will be manslaughter. But there

is another question,—**did he use the weapon in defence of his life? Before a person can avail himself of that defence, he must satisfy the jury that that defence was necessary, that he did all he could to avoid it, and that it was necessary to protect his own life, or to protect himself from such serious bodily harm as would give a reasonable apprehension that his life was in immediate danger.** If he used the weapon, having no other means of resistance and no means of escape, in such case, if he retreated as far as he could he will be justified. There is a further question which is raised by the defence, viz. that the death was the result of accident by the deceased in the scuffle falling on the bayonet. This ranges itself under the first question; because, if the fact were so, the death cannot be said to have been occasioned by the **act of the prisoner.**

R. v. KIRKHAM

(1837).

8 C. & P. 115.

K. was indicted for the murder of his son. The evidence of a witness for the prosecution (named Chorlton) was as follows: "I entered the prisoner's house and saw him and his son wrestling on the floor. I told the son to get up, he did so and went to the door. The prisoner then took up a coal pick which was in the room and threw it at his son. The son said it hurt him and the prisoner said he would have his revenge. The coal pick flew out into the street and the son fetched it and threw it back into the house but not at the prisoner. The son was standing at the door when the prisoner took a knife and jobbed him in the left side. The son said, 'Father, you have killed me,' and reeled out into the street. The prisoner said, 'Joe, I will have my revenge.' The son came into the house and the prisoner stabbed him again." Another witness for the prosecution gave evidence that the prisoner had some few days earlier threatened to kill his son.

COLERIDGE, J. (in summing up).—Every indictment of this kind may receive at the hands of the jury one of three terminations. First, that the prisoner is innocent; secondly, that he occasioned the death in such a way as implies blame, but still falls short of wilful murder; and, lastly, the party may be found guilty of murder. Before I go to the minute points of the case, it may be convenient to state the general principles upon which the law turns with regard to this

subject. As soon as it is ascertained that one individual in possession of his reason has wilfully taken away the life of another, the law's first presumption is that the party is guilty of **murder.** This, you know, supposes the act to have been done **maliciously**; but with regard to malice I should tell you, that it is not necessarily meant by that term that at the moment the party killing has an old or present grudge against the deceased—it is not at the moment he takes away life, he is acting on some deliberate design. It is only that the party has done the act **knowing that he does it, and that the means are such as, in all human reason, are likely to produce death.** If I were to take a loaded pistol and fire it into that crowd, who are entirely strangers to me—if I did that act deliberately and death ensued, I should be guilty of murder. The law would say that I did it with malice prepense. I could not do it without having bad feelings and a reckless heart. Everyone must be presumed to intend the natural consequence of his acts. If you throw a stone at a window it must be taken that you intend to break it, because it is a brittle substance. That being so if you had heard nothing more than simply that the prisoner taking a knife in his hand had stabbed his son, that would have put it on him to clear himself from the charge of murder. The law requires from him and will allow him to shew that there was some mitigating circumstances, which alter the presumed character of the act, because it has at once a sacred regard for human life and also a respect for man's failings and will not require more from an imperfect creature than he can perform; and therefore, as it is well known that there are certain things which so stir up man's blood that he can no longer be his own master, the law makes allowance for them. **If,** therefore, **a person being stung and excited inflicts a blow or wound provided the provocation be sufficient, and acting upon him at the time, and recent, he will only be guilty of manslaughter;** and in this the law does not depart from its original principle, because it then supposes that the individual was not guilty of malice prepense, but that what he did was done in a moment of overpowering passion, which prevented the exercise of reason; so that the general distinction is this: in the one case the man is cool, and must be taken to have malice; in the other, if he has had sufficient provocation, and has acted from that provocation

while it is fresh, then he has not malice. In some instances you must feel certain, from the acts of the party, that he had a grudge. Suppose a man destroyed another by poison; if it were proved that he had previously bought the poison and prepared the cup, although he should have had a quarrel with the party at the very time of administering it, you could not doubt that there was express and actual malice. If a person has received a blow, and in the consequent irritation immediately inflicts a wound that occasions death, that will be manslaughter. But he shall not be allowed to make this blow a cloak for what he does; and therefore, as in the case of poisoning, though there may have been an actual quarrel, and the deceased shall have given a great number of blows, yet if the party inflict the wound, not in consequence of those blows, but in consequence of previous malice, all the blows would go for nothing. So in the present case, if there was a stab given in consequence of a grudge entertained a day or two before, all that passed between these parties at the very time must go for nothing, for the simple reason that the blows were not the cause of the crime. So that if you believe that on the Monday or Wednesday before the prisoner used threats which have been sworn to, deliberately, then all the quarrel and the wrestling may be entirely dismissed from your consideration. I for one, however, am not disposed to pay much attention to declarations of this description. In some cases they may be deserving of consideration, but least of all, if they proceed from a passionate man in that situation of life in which the prisoner is. Then I will suppose that all was purely unpremeditated until Chorlton came, and then the case will stand thus—the father and son have a quarrel, the son gets the father down, the son has the best of it, and the father has received considerable provocation; and if, when he got up and threw the pick at the deceased he had at once killed him, I should have said at once that it was manslaughter. Now comes the more important question (the son having given no further provocation), whether in truth that which was in the first instance sufficient provocation, was so recent to the actual deadly blow that it excused the act that was done, and whether the father was acting under the recent sting, or had had time to cool, and then took up the deadly weapon. I told you just now he must be excused if the provocation was recent and

he acting on its sting, and the blood remained hot, but you must consider all the circumstances—the time which elapses, the prisoner's previous conduct, the deadly nature of the weapon, the repetition of the blows; because the law condescends to human frailty, it will not indulge human ferocity. It considers man to be a rational being, and requires that he should exercise a reasonable control over his passions.

R. v. LYNCH
(1832).
5 C. & P. 324.

Lynch was indicted for the wilful murder of H. They had been drinking together until 12 at night. When they went out into the street they quarrelled and H. gave Lynch a black eye. Lynch called for the police and on a policeman coming went away. About five to ten minutes afterwards he returned and stabbed H. with a common pocket-knife which he was in the habit of carrying.

Lord Tenterden (in summing up).—It is not every slight provocation, even by a blow, which will, when the party receiving it strikes with a deadly weapon, reduce the crime from murder to manslaughter. But it depends upon the time elapsing between the blow and the injury; and also, whether the injury was inflicted with an instrument at the moment in the possession of the party, or whether he went to fetch it from another place. It is uncertain, in this case, how long the prisoner was absent. The witness says from five to ten minutes, according to the best of his knowledge. Unless attention is particularly called to it, it seems to me that the evidence of time is very uncertain. The prisoner may have been absent less than five minutes. There is no evidence that he went anywhere for the knife. The father says, it was a knife he carried about with him, it was a common knife, such as a man in the prisoner's situation in life might have: for aught that appears, he might have gone a little way from the deceased and then returned, still smarting under the blow he had received. You will also take into consideration the previous habits and connection of the deceased and the prisoner with respect to each other. If there had been any old grudge

between them, then the crime which the prisoner committed might be murder. But it seems they had been long in habits of intimacy, and on the very night in question, about an hour before the blow, they had been drinking in a friendly way together. **If you think that there was not time and interval sufficient for the passion of a man proved to be of no very strong intellect to cool, and for reason to regain her dominion over his mind, then you will say that the prisoner is guilty only of manslaughter.** But if you think that the act was the act of a wicked, malicious, and diabolical mind (which, under the circumstances, I should think you hardly would), then you will find him guilty of murder.

R. v. HAYWARD

(1833).

6 C. & P. 159.

A. was requested by his mother to turn B. out of her house, which request he carried out after a struggle. B. said he would make A. remember it and went back to his own lodgings, about 300 yards away, from which he fetched a knife that he used in his business as a butcher. Coming out from his lodgings he met A., who had followed to give him his hat which had been left behind. A. then asked B. not to come to his mother's house again that night, but B. insisted that he would. After A. and B. had walked a few yards in the direction of the mother's house, A. gave B. his hat, when B. exclaimed that he would have his rights and suddenly stabbed A. in two places with the butcher's knife. One wound was mortal and B. was accordingly indicted for murder.

TINDAL, C.J., told the jury that if they were satisfied that the death of the deceased had been occasioned by the prisoner having stabbed him with a knife, or some other sharp instrument, of which there could be little doubt, the remaining and principal question for their consideration would be, whether the mortal wound was given by the prisoner while smarting under a **provocation so recent and so strong, that the prisoner might not be considered at the moment the master of his own understanding**; in which case, the law, in compassion to human infirmity, would hold the offence to amount to manslaughter only; **or whether there had been time for the blood to cool, and for reason to resume its seat,** before the mortal wound

was given, in which case the crime would amount to wilful murder. That, in determining this question, the most favourable circumstance for the prisoner was the shortness of time which elapsed between the original quarrel and the stabbing by the prisoner; but, on the other side, the jury must recollect that the weapon which inflicted the fatal wound was not at hand when the quarrel took place, but was sought for by the prisoner from a distant place. It would be for them to say whether the prisoner had shewn thought, contrivance, and design, in the mode of possessing himself of this weapon, and again replacing it immediately after the blow was struck; for **the exercise of contrivance and design denoted rather the presence of judgment and reason, than of violent and ungovernable passion.**

R. v. JOHN ST. JOHN LONG

(1830).

4 C. & P. 398.

A person acting as a medical man, whether licensed or unlicensed, is not criminally responsible for the death of a patient occasioned by his treatment, unless his conduct is characterized either by gross ignorance of his art or gross inattention to his patient's safety.

Mr. Justice Park (in summing up).—The learned counsel for the prosecution truly stated, in the outset, that whether the party be licensed or unlicensed is of no consequence, except in this respect, that he may be subject to pecuniary penalties for acting contrary to charters or Acts of Parliament. . . .

There is clear proof that the prisoner did the act which shortened Miss Cashen's life. But that does not prove the case unless you think that there was **gross ignorance or inattention** to human life to be inferred from it. . . . Undoubtedly, the result proves a very erroneous opinion on his part . . . but the question again recurs, whether this was an erroneous judgment of a person who was of general competency, though he unfortunately failed in the particular instance. . . .

On the one hand, we must be careful and most anxious to prevent people from tampering in physic, so as to trifle with the life of man; and on the other hand, we must take care not to charge

criminally a person who is of general skill, because he has been unfortunate in a particular case . . . it would be a dreadful thing if a man were to be called in question criminally whenever he happened to miscarry in his practice. These are things for your consideration when you are considering whether a man is acting wickedly; **for I call it acting wickedly when a man is grossly ignorant and yet affects to cure people or when he is grossly inattentive to their safety.** (*a*)

R. v. WILLIAMSON

(1829).

3 C. & P. 635.

W. was charged with manslaughter. He was not a regularly educated accoucheur, but had been in the habit of acting as a man-midwife among the poorer classes. In delivering a woman he had made a mistake which had caused her death. *Held*, that he was not indictable for manslaughter unless he had been guilty of criminal misconduct, arising either from the grossest ignorance or the most criminal inattention.

Lord Ellenborough, C.J. (in summing up).—There has not been a particle of evidence adduced which goes to convict the prisoner of the crime of murder; but still it is for you to consider whether the evidence goes so far as to make out a case of manslaughter. To substantiate that charge, the prisoner must have been guilty of **criminal misconduct, arising either from the grossest ignorance or the most criminal inattention.** One or other of these is necessary to make him guilty of that criminal negligence and misconduct which is essential to make out a case of manslaughter. It does not appear that in this case there was any want of attention on his part; and from the evidence of the witnesses on his behalf, it appears that he had delivered many women at different times, and from this he must have had some degree of skill. It would seem, that having placed himself in a dangerous situation, he became shocked and confounded. I think that he could not possibly have committed such mistakes

(*a*) Another summing up to the same effect in an indictment against the same person on a charge of a similar character will be found in 4 C. & P. at p. 440.

in the exercise of his unclouded faculties; and I own that it appears to me, that if you find the prisoner guilty, it will tend to encompass a most important and anxious profession with such dangers as would deter reflecting men from entering into it. Not guilty.

R. v. SALMON

(1880).

6 Q. B. D. 79; 50 L. J. M. C. 25.

A., B. and C. went into a field near roads and houses for the purpose of practising with a rifle which would be deadly at a mile. B. in the presence of C. placed in a tree as a target a board handed to him by A. A., B. and C. all fired at this board, and a shot fired by one of them, it was not proved by which, killed a boy in a garden about a quarter of a mile away. *Held*, that they were all rightly convicted of manslaughter.

LORD COLERIDGE, C.J.—The conviction must be affirmed. **If a person will, without taking proper precautions, do an act which is in itself dangerous, even though not an unlawful act in itself, and if in the course of it he kills another person, he does a criminal act which in law constitutes manslaughter.** It was manslaughter in him who killed the boy. The death resulted from the action of the three, and they are all liable.

FIELD, J.—I am of the same opinion. I had some doubt as to whether there was any duty owed by the prisoners to the particular boy, but it seems to me that **there is a general duty to the public** of which the prisoners committed a breach. They had a duty **not to use a weapon likely to cause death or injury in an improper place and without taking proper precautions to avoid injury.** The evidence shews that the duty was not observed. The character of the place and the probability of persons being about was such that I am satisfied the conviction was right.

STEPHEN, J.—**Manslaughter is unlawful homicide not amounting to murder.** It is unlawful where caused by the culpable omission to discharge a duty tending to the preservation of life. There is a duty tending to the preservation of life to take proper precautions in the use of dangerous weapons or things. **It is the legal duty of everyone who does any act, which without ordinary precautions is or may be dangerous to human life, to employ those precautions in doing it.** Firing a rifle under circumstances such as in the present case was

a highly dangerous act, and all are responsible, for they unite to fire at the spot in question, and they all omit to take any precautions whatever to prevent danger.

R. v. MORBY

(1881).

8 Q. B. D. 571; 51 L. J. M. C. 85.

A.'s son died of smallpox. A. was a member of a religious sect which did not believe in medical aid and had not therefore obtained any medical advice or attendance. It was proved that medical assistance might have saved the child's life and would have increased its chances of recovery, but there was no positive evidence that the death was caused or accelerated by the neglect to provide medical aid. *Held*, that A. could not be convicted of manslaughter.

Lord Coleridge, C.J.—It is not enough to shew neglect of reasonable means for preserving or prolonging the child's life, but **to convict of manslaughter it must be shewn that the neglect had the effect of shortening life.** The medical witness called for the prosecution gave his evidence clearly and well, and under a high sense of his duty and responsibility, and what he stated was, that in his opinion the *chances* of life would have been increased by having medical advice, that life *might* possibly have been prolonged thereby, or, indeed, might probably have been, but he could not say that it would, or indeed that it would probably have been prolonged thereby. In order to sustain the conviction affirmative proof is required; this the skilled witness called, and upon whose evidence the matter rests, cannot, from the nature of the case, give, and indeed, properly declines to give. The direction of the learned judge, though right in point of law, is not applicable to the facts proved. The conviction cannot be sustained.

Grove, J.—The judge seems to have considered that proof of the mere possibility of medical aid being of use in cases such as the one in question was not enough, that "might," in fact, was not enough, and leaves the matter to the jury, asking them to answer the question which the skilled witness said he could not. This they do, but there really was no satisfactory evidence for them, and the conviction ought not to stand.

STEPHEN, J.—I am of the same opinion. Under s. 37 of 31 & 32 Vict. c. 122, it may be the prisoner could have been convicted of neglect of duty as a parent, but **to convict of manslaughter you must shew that he caused death or accelerated it.**

R. v. MARRIOTT

(1838).

8 C. & P. 425.

Mrs. Warner was a lady of about seventy-four who lived with her sister Mrs. Reepe. On the death of Mrs. Reepe a grandson, Charles Reepe, offered to take charge of Mrs. Warner. Marriott, however, claimed to be executor of Mrs. Reepe and said "Mrs. Warner is going home to live along with me until affairs are settled, and I will make her happy and comfortable." There was also other evidence to shew that Marriott had interfered in Mrs. Warner's affairs *and had undertaken to provide her with food and necessaries.* Mrs. Warner accordingly went to live with Marriott and died in his house after a few months. The evidence shewed that she was often locked up alone in winter weather in a kitchen without light or fire, that she was excited and cried to get out and that she died from water on the brain. This condition might be the result of exhaustion consequent upon exposure in such a room and the excitement caused by the confinement. The body was, however, very emaciated and shewed the want of proper food and nourishment.

PATTESON, J., in summing up . . . said: If the prisoner was guilty of wilful neglect, so gross and wilful that you are satisfied he must have contemplated the death of Mrs. Warner, then he will be guilty of murder. If, however, you think only that he was so careless, that her death was occasioned by his negligence, though he did not contemplate it, he will be guilty of manslaughter. The cases which have happened of this description have been generally cases of children and servants, where the duty has been apparent. This is not such a case; but it will be for you to say, whether from the way in which the prisoner treated her, he had not by way of contract, in some way or other, *taken upon him* the performance of that duty which she from age and infirmity was incapable of doing. [His Lordship then read the evidence and continued.]

This is the evidence on which you are called on to infer that the prisoner undertook to provide the deceased with necessaries; and

though if he broke that contract he might not be liable to be indicted during her life, yet if by his negligence her death was occasioned then he becomes criminally responsible.

R. v. SENIOR

(1899).

[1899] 1 Q. B. 283; 68 L. J. Q. B. 175.

The prisoner was indicted for the manslaughter of his infant child. He belonged to a sect which objected on religious grounds to medical assistance and he had deliberately abstained from providing any. Medical aid would have prolonged and probably saved the child's life. *Held*, that the prisoner had wilfully neglected the child within the meaning of s. 1 of the Prevention of Cruelty to Children Act, 1894, and having thereby caused or accelerated its death he was guilty of manslaughter.

Lord Russell of Killowen, C.J.—The charge is preferred under s. 1 of the statute to which I have referred (57 & 58 Vict. c. 41), the material words of which are as follows: "If any person over the age of sixteen years, who has the custody, charge, or care, of any child under the age of sixteen years, wilfully neglects . . . such child . . . in a manner likely to cause such child unnecessary suffering or injury to its health . . . that person shall be guilty of a misdemeanour."

The portions of the summing up which it is necessary to refer to are the following: "I told the jury that they must first of all be satisfied that the death of the child had been caused or accelerated by the want of medical assistance; and secondly, that medical aid and medicine were such essential things for the child, that reasonably careful parents in general would have provided them; and thirdly, that the prisoner's means would have enabled him to do so, without an expenditure such as could not be reasonably expected from him." A little further on in the case the learned judge states as follows: "**But I added that if he had done anything which was expressly forbidden by statute, and by so doing had caused or accelerated the child's death, he would be guilty of manslaughter, no matter what his motive or state of mind.**" Later on he adds this: "I said there could be no doubt that the prisoner had wilfully and deliberately

abstained from calling in medical assistance, though he and those about the child were aware for some considerable period before its death that it was in a state of great danger, and that therefore the question was narrowed down to whether his failure to procure medical aid could be called neglecting the child so as to cause injury to its health. I pointed out that the language was very different from that of the repealed enactment."

The question is whether that direction was substantially right. I think it was. Whether the words in the statute, "wilfully neglects," are taken together, or, as the learned judge did in directing the jury, are taken separately the meaning is very clear. "**Wilfully**" **means that the act is done deliberately and intentionally, not by accident or inadvertence, but so that the mind of the person who does the act goes with it. Neglect is the want of reasonable care—that is the omission of such steps as a reasonable parent would take, such as are usually taken in the ordinary experience of mankind**—that is, in such a case as the present, provided the parent had such means as would enable him to take the necessary steps. I agree with the statement in the summing up that the standard of neglect varied as time went on, and that many things might be legitimately looked upon as evidence of neglect in one generation which would not have been thought so in a preceding generation, and that regard must be had to the habits and thoughts of the time. At the present day when medical aid is within the reach of the humblest and poorest members of the community, **it cannot reasonably be suggested that the omission to provide medical aid for a dying child does not amount to neglect.** Mr. Sutton contended that because the prisoner was proved to be an affectionate parent, and was willing to do all things for the benefit of his child, except the one thing which was necessary in the present case, he ought not to be found guilty of the offence of manslaughter, on the ground that he abstained from providing medical aid for his child in consequence of his peculiar views in the matter; but we cannot shut our eyes to the danger which might arise if we were to accede to that argument, for where is the line to be drawn? In the present case the prisoner is shewn to have had an objection to the use of medicine; but other cases might arise, such, for instance, as the case of a child with a

broken thigh, where a surgical operation was necessary, which had to be performed with the aid of an anæsthetic; could the father refuse to allow the anæsthetic to be administered? Or take the case of a child that was in danger of suffocation, so that the operation of tracheotomy was necessary in order to save its life, and an anæsthetic was required to be administered.

I think it cannot be doubted that if this case had arisen under the Act of 1868 there would have been ample evidence to warrant a conviction, and in my opinion there is also ample evidence where the case arises under the Act of 1894. I am of opinion that the summing up of the learned judge was right and the conviction ought to be affirmed.

STEPHENS v. MYERS

(1830).

4 C. & P. 349.

The plaintiff was acting as chairman at a meeting and sat at a table at which the defendant also sat, there being six or seven persons between them. The defendant being disorderly a motion was carried that he should be turned out. The defendant threatened to pull the plaintiff out of his chair and was advancing with his fists clenched and apparently with the intention of carrying out his purpose, when he was stopped by another person. At the time when he was stopped he was not near enough to reach the plaintiff by a blow with his fist. *Held*, that it was an assault in point of law.

Tindal, C.J. (in summing up).—It is not every threat, when there is no actual personal violence, that constitutes an assault: there must, in all cases, be the means of carrying the threat into effect. The question I shall leave to you will be, whether the defendant was advancing at the time, in a threatening attitude, to strike the chairman, so that his blow would almost immediately have reached the chairman, if he had not been stopped; then, though he was not near enough at the time to have struck him, yet if he was advancing with that intent, I think it amounts to an assault in law. If he was so advancing that, within a second or two of time, he would have reached the plaintiff, it seems to me it is

an assault in law. If you think he was not advancing to strike the plaintiff, then only can you find your verdict for the defendant; otherwise you must find it for the plaintiff and give him such damages as you think the nature of the case requires.

R. v. DAY

(1841).

9 C. & P. 722.

The prisoner was charged upon an indictment containing a count for a common assault on a girl of ten years of age. The child offered no resistance, but submitted quietly. *Held*, that mere *submission* due to fear is not equivalent to voluntary *consent* so as to amount to a defence.

COLERIDGE, J. (in summing up).—It has been contended by the learned counsel on behalf of the prisoner, that this case, being now reduced to a charge of common assault only, consent or non-consent on the part of the prosecutrix becomes material; and so indeed it does; but then we must look at the nature of the circumstances from which consent is to be inferred. **There is a difference between consent and submission;** every consent involves a submission; but it by no means follows that a mere submission involves consent. It would be too much to say, that an adult submitting quietly to an outrage of this description was not consenting; on the other hand, the mere submission of a child when in the power of a strong man, and most probably acted upon by fear, can by no means be taken to be such a consent as will justify the prisoner in point of law. You will therefore say whether the submission of the prosecutrix was voluntary on her part, or the result of fear under the circumstances in which she was placed. If you are of the latter opinion, you will find the prisoner guilty on the second count of the indictment.

SEWELL v. THE NATIONAL TELEPHONE COMPANY LIMITED

(1907).

[1907] 1 K. B. 557; 76 L. J. K. B. 196.

A. was arrested by police constables and taken to a police station and charged with stealing a piece of metal the property of B. He was detained

in custody till the following morning, when he was brought before a magistrate and committed to quarter sessions, where he was acquitted. While A. was at the police station B. was communicated with and his manager went to the police station and signed the charge sheet. *Held*, that the mere signing of a charge sheet was not evidence of anything directly causing the imprisonment of A.

COLLINS, M.R.—The distinction between actions for false imprisonment and actions for malicious prosecution is well settled, and cannot be put better than in the words of Willes, J., in his judgment on the case of *Austin* v. *Dowling*. (*a*) The learned judge said: "**The distinction between false imprisonment and malicious prosecution is well illustrated by the case where, parties being before a magistrate, one makes a charge against another, whereupon the magistrate orders the person charged to be taken into custody and detained until the matter can be investigated. The party making the charge is not liable to an action for false imprisonment, because he does not set a ministerial officer in motion, but a judicial officer. The opinion and judgment of a judicial officer are interposed between the charge and the imprisonment.** There is, therefore, at once a line drawn between the end of the imprisonment by the ministerial officer and the commencement of the proceedings before the judicial officer. It is fallacious to inquire whether or not the one is severable from the other, until you find some inseparable connection between them. It may very well happen in the superior Courts, which have jurisdiction over both descriptions of action, where the plaintiff, having been at once taken before a magistrate, may be content to bring his action for false imprisonment only. In such a case—which must be within the memory of all of us—the judge would tell the jury to give damages for the false imprisonment only, and not for what came under the cognizance of the magistrate." Bearing that distinction in mind, this case falls on the side of the line on which no action for false imprisonment will lie. **If a person desires to obtain a judicial decision from a proper tribunal, and for that purpose states the facts to a police officer, and the latter, acting on his own initiative, arrests the person implicated, no trespass is committed by the person who gives information to the police officer.**

(*a*) L. R. 5 C. P. at p. 540.

The defendants in this case had nothing to do, so far as appears by the evidence, with the initiation of the charge against the plaintiff. The man had been taken into custody, and not till he was in custody at the police station did the defendants appear on the scene. At that stage their representative signed the charge sheet on their behalf, and the case of the plaintiff is bare of everything but that fact. It is admitted that they took, through their representative, a step which might have been essential to the carrying on of the prosecution, but the action is no longer in respect of a malicious prosecution, for that claim has been abandoned. The act that was done was merely to provide a prosecutor, and that does not let in liability to an action for false imprisonment, unless the person who takes that step has taken on himself the responsibility of directing the imprisonment. It is quite consistent with the signing of a charge sheet that the person who does this is in the position of one invoking judicial intervention. The signing of the charge sheet would not be evidence to go to the jury if contradictory inferences can be drawn from it, for the duty lying on the plaintiff of proving his case would not be completed. The learned judge was bound to withdraw the case from the jury on the ground that there was no evidence in support of it fit for their consideration, and this appeal fails and must be dismissed.

R. v. LYNCH

(1903).

[1903] 1 K. B. 444; 76 L. J. K. B. 167.

L., a British subject, obtained letters of naturalization in the South African Republic after the commencement of the South African war. *Held*, that this was in itself an act of treason and no defence to an indictment for treason in subsequently joining the military forces of the enemy.

Lord Alverstone, C.J.—We have none of us any doubt whatever upon this point; but, having regard to the nature of the proceedings and their serious character, we thought it better that the matter should be fully argued before we expressed our opinion. The indictment charges the prisoner in two counts with adhering to the Government of the South African Republic, and in the others

with adhering to the Government of the Orange Free State, and it alleges altogether some fifteen overt acts; but for the purposes of the argument that has been addressed to us it is important to draw a distinction between the two first overt acts and the subsequent overt acts. The two first acts, the declaration of willingness to take up arms and the taking of oath of allegiance to the South African Republic, although they took place on the same day as the grant of letters of naturalization, in fact preceded it. The other overt acts were all deliberate acts of warfare or in aid of warfare against the forces of the Crown, and took place subsequently to the grant of naturalization. It is not disputed on behalf of the prisoner that, apart from the Naturalization Act, 1870, the alleged naturalization in the enemy State would afford no defence. But reliance is placed on s. 6, which provides that "any British subject who has at any time before or may at any time after the passing of this Act, when in any foreign State and not under any disability, voluntarily become naturalized in such State, shall from and after the time of his so having become naturalized in such foreign State, be deemed to have ceased to be a British subject, and be regarded as an alien." It is contended that this provision entitles a British subject to become an alien and throw off his allegiance to the Crown even in time of war. Even if that were so, it would afford no defence in respect to the first two overt acts, for by s. 15, "Where any British subject has in pursuance of this Act become an alien, he shall not thereby be discharged from any liability in respect of any acts done before the date of his so becoming an alien." And it cannot be seriously contended that the two first acts which formed the basis of the naturalization, and without which naturalization could not under the circumstances have been obtained at all, were not "done before the date of his so becoming an alien" within the meaning of s. 15. But, further, I am clearly of opinion that s. 6 does not empower a British subject to become naturalized in an enemy country during time of war, and that consequently the question of the prisoner's liability with respect to the subsequent overt acts must also be left to the jury. In my opinion there is nothing in the Act of 1870 to justify the contention that an act of treason can give any rights to any person whatever. If it was

the intention of the Legislature to produce so strange a result, that intention must be found expressed in clear and explicit language, and not be inferred from general language designed to serve another and useful purpose. Whatever a declaration of war may or may not do, it at any rate prevents British subjects from making arrangements with the King's enemies, when such arrangements would constitute crimes against the law of the country to which they owe allegiance.

R. v. BAKER

(1895).

[1895] 1 Q. B. 797; 64 L. J. M. C. 177.

A. was charged with selling beer without a licence. Being sworn he deposed that he had never authorized his solicitor to plead guilty to a previous charge of the same nature and that he had no knowledge that his solicitor intended to plead guilty on his behalf on the previous occasion. In fact A. had authorized his solicitor to plead guilty to the earlier charge and had expressed his satisfaction with the result. *Held*, that, as A.'s statements affected his credit as a witness at the hearing of the second charge, they were material and therefore he was guilty of perjury.

Lord Russell of Killowen, C.J.—The sole point for our consideration in this case is whether the statements made by the defendant, which the jury have found to have been made falsely and wilfully, were material to the case which was before the stipendiary magistrate when the defendant was charged for the second time with the offence of selling beer without a licence. I will take the grounds relied on for the defendant in the order in which they are stated in the case. The first ground taken is that as the defendant had admitted his previous conviction, and had not appealed therefrom, it was immaterial to the then pending inquiry whether the previous plea of guilty had been put in by the defendant's consent or not. The answer to that contention is that the defendant's answers would affect his credit as a witness, and **all false statements, wilfully and corruptly made as to matters which affect his credit are material.** The magistrate may be influenced, in arriving at his decision, by the circumstances of the previous conviction, and, if the defendant's solicitor had pleaded guilty on his behalf without

his knowledge or consent, that circumstance might have been taken into consideration as affecting the amount of punishment. The second ground taken is that the previous conviction could only become material when the magistrate decided to convict in the then pending proceeding, and that, as a fact, the proceedings had been adjourned to await the result of the prosecution for perjury. I do not see the relevance of that argument. The magistrate must consider the case on the evidence given before him, and the circumstances may have an influence on the punishment. If on the previous occasion the defendant had, as he alleged, been convicted *per incuriam*, the magistrate might have given him the benefit of that fact, and might have treated the subsequent charge as if it had been a charge of a first offence. The third ground taken is that a previous conviction only affected the amount of punishment to be awarded by a magistrate, and not any issue to be determined by him, and further that the magistrate could only take cognizance of the fact of the previous conviction, and not of the circumstances under which it took place. But as I have already pointed out in dealing with the previous objections, it is wrong to suggest that the magistrate could only take cognizance of the fact of the previous conviction. For these reasons I am of opinion that the words stated in the case were material. I will deal shortly with the authorities. In *R.* v. *Overton* (*a*) the date of a receipt which had been given for the price of a greyhound was held to be material. Patteson, J., so held, after consulting Parke, B., on the ground that **every question on cross-examination of a witness which goes to his credit is material.** The case afterwards came before a Court consisting of eleven judges, who supported the view adopted by Parke, B., and Patteson, J. In *R.* v. *Lavey*, (*b*) where a plaintiff in a county court had falsely sworn that she had never been tried at the Old Bailey, and had never been in custody at the Thames Police Station, the evidence was held to be material. This, again, was on the ground that it affected her credit. In *R.* v. *Gibbon* (*c*) it was held by eleven judges, Martin, B., and Crompton, J., doubting, that perjury might be assigned on evidence going to the credit of a material witness in a cause although

(*a*) C. & M. 655. (*b*) 3 C. & K. 26. (*c*) L. & C. 109.

such evidence, being legally inadmissible, ought not to have been received. That is a very strong authority—much stronger than is needed to support the conviction in the present case. I am of opinion that the evidence was material, and the conviction was right and ought to be affirmed.

R. v. WARBURTON

(1871).

L. R. 1 C. C. R. 276; 40 L. J. M. C. 22.

W. and L. were in partnership. W. for the purpose of defrauding L. entered into an agreement with P. to make it appear that P. was a creditor of the firm so that certain partnership property might be handed over to P. and divided between W. and P. The offence was complete before the Larceny Act, 1868, by which a partner can be criminally convicted for feloniously stealing partnership property. *Held*, that such a fraudulent agreement was a conspiracy.

COCKBURN, C.J.—It is sufficient to constitute a conspiracy if two or more persons combine by fraud and false pretences to injure another. **It is not necessary to constitute a conspiracy that the acts agreed to be done should be acts which if done would be criminal. It is enough if the acts agreed to be done, although not criminal, are wrongful,** *i.e.*, **amount to a civil wrong.** Here there was undoubtedly an agreement with reference to the division of the partnership property or of the partnership profits. It is equally clear that the agreement was to commit a civil wrong, because the agreement was to deprive the prisoner's partner by fraud and false pretences of his just share of the property or profits of the partnership. A civil wrong was thus intended to (him). The facts of this case thus fall within the rule that, **when two fraudulently combine, the agreement may be criminal, although if the agreement were carried out no crime would be committed, but a civil wrong only would be inflicted on a third party.** In this case the object of the agreement was, perhaps, not criminal. It is not necessary to decide whether or not it was criminal; it was, however, a conspiracy, as the object was to commit a civil wrong by fraud and false pretences, and I think that the conviction should be affirmed.

R. v. BURGESS

(1886).

16 Q. B. D. 141; 55 L. J. M. C. 97.

Burgess was employed to levy a distress on the goods of Bedford. Bagley while in possession as the assistant of Burgess stole 28*s.* from a drawer in the house. Burgess was informed by Bedford and on April 3 gave information to the police. On June 11 Burgess saw Bedford's mother and gave her the following document: "I, W. H. Burgess, undertake not to charge A. Bagley with any criminal case that I have now against him on the money being provided to pay what he took from Peckham Road while in possession, viz., 30*s.*, W. H. Burgess." On July 5, Bagley's stepfather paid Burgess £1 and gave him an IOU for 5*s.*, on which Burgess wrote a receipt at the foot of the original document, "Received the sum of 30*s.* as stated above." Burgess then told Bagley he was a free man and that things were all right as he had paid the money. *Held*, that Burgess was guilty of compounding a felony.

Lord Coleridge, C.J.—This case raises two questions, the first being whether this indictment is bad on the face of it, and the second being whether there was any evidence upon the indictment as framed to go to the jury. With regard to the first question, it is admitted that the indictment sufficiently alleged the offence, if the offence is complete without the allegation that the defendant abstained from prosecuting. It is suggested that the indictment is bad because it does not allege that the defendant did abstain from prosecuting. The difficulties in the way of that contention are to my mind enormous. One question which at once arises is when on that view can the offence be said to be complete? A man might conceivably make an illegal agreement not to prosecute and abstain from prosecuting for six years and then might turn round and prosecute after all in breach of the agreement. According to the contention he could not be guilty of the offence because he did ultimately prosecute, and if so it is difficult to see when such an offence can be said to be complete. The way in which one of my learned Brothers put the contention seems to me to be a *reductio ad absurdum* of the argument. It being admitted that such an agreement is unlawful in the sense that it is not enforceable at law, it is said that, if the maker of it keeps his agreement, he is guilty of an offence, but if, in addition to making such an illegal

agreement, he is guilty of the further fraud towards the other party of breaking it, he is guilty of no offence at all. Thus stated the proposition seems to me to be contrary to good sense, and to be a sufficient answer to itself. Then it is said that the offence alleged is the old offence of theft-bote and that no one can be guilty of that offence except the owner of the goods. I do not deny that by some writers, especially by Lord Coke, expressions have been used which may be read so as to afford some countenance to this contention. It seems to me, however, that when the writers in question so expressed themselves, it was probably because the question whether the offence could be committed by persons other than the owner of the goods was not then present to their minds and they were dealing with what would be the case on ninety-nine out of a hundred occasions, viz. the case where the person who was guilty of interfering with the course of justice for his own benefit was the owner of the goods. One can easily see, I think, how it has happened in this way that language has been used which seems to favour to some extent the contention for the defendant, but it must be observed that the writers of the passages to which I refer do not use any negative expression to the effect that the offence can only be committed by the owner of the goods. But, on the other hand, there are not wanting in some of the other authorities indications of the contrary view. The language used by Blackstone in his Commentaries concerning theft-bote seems to me to shew that he can hardly have considered the offence as capable of being committed only by the owner of the goods. I admit that he does not say expressly that it can be committed by another person. But neither, on the other hand, do the writers who have been cited expressly say that it cannot. He says of theft-bote: "this is frequently called compounding a felony, and formerly was held to make a man an accessory but is now punished only with fine and imprisonment. This perversion of justice in the Old Gothic constitutions was liable to the most severe and infamous punishment, and the Salic law *latroni eum similem habuit qui furtum celare vellet et occulte sine judice compositionem ejus admittere.*" This latter portion of what he says on the subject clearly seems inconsistent with the notion that he thought the offence of compounding the felony could only be

committed by the owner of the goods, for it seems to imply that the definition as given by the Salic law was a good definition of the offence of compounding a felony, and that anyone was guilty of the offence, "*qui furtum celare vellet et occulte sine judice compositionem ejus admittere.*" These expressions seem to me to indicate that there was present to his mind the possibility of the offence being committed by a person other than the owner of the goods. I am of opinion that the defendant upon the facts stated was guilty of the offence of compounding a felony and that therefore the conviction must be affirmed.

BEATTY v. GILLBANKS

(1882).

9 Q. B. D. 308; 51 L. J. M. C. 117.

Beatty was a leader of the Salvation Army at Weston-super-Mare and was accustomed to organize Sunday processions through the streets of that town. A rival organization, calling itself the Skeleton Army, was hostile to the Salvation Army and formed processions with the object of preventing the passage of the Salvation Army. Large mobs accompanied and encouraged both the rival processions so that when they came into collision serious riots ensued. In consequence of this state of affairs a notice was issued and signed by two justices of the peace forbidding all persons from assembling to the disturbance of the public peace. The next Sunday after the issue of this notice a police sergeant stopped the procession of the Salvation Army and told Beatty that he must desist from leading it and disperse at once or he would be arrested. Beatty however refused to comply and marched on, when he was arrested. His place as leader was then taken by Mullins and Bowden, who were thereupon also arrested. Neither of these three persons were guilty of any act of violence and all submitted quietly to arrest. They were charged at petty sessions for unlawfully and tumultuously assembling with others to the disturbance of the public peace and against the peace of the Queen, and were convicted and fined. *Held*, that they were not rightly convicted.

FIELD, J.—I am of opinion that this order cannot be supported. The matter arises in this way. The appellants have, with others, formed themselves into an association for religious exercises among themselves, and for a religious revival, if I may use that word, which they desire to further among certain classes of the community. No

one imputes to this association any other object, and so far from wishing to carry it out with violence, their opinions seemed to be opposed to such a course, and, at all events in the present case, they made no opposition to the authorities. That being their lawful object, they assembled as they had done before and marched in procession through the streets of Weston-super-Mare. No one can say that such assembly is in itself an unlawful one. The apellants complain that in consequence of this assembly they have been found guilty of a crime of which there is no reasonable evidence that they have been guilty. The charge against them is that they unlawfully and tumultuously assembled, with others, to the disturbance of the public peace and against the peace of the Queen. Before they can be convicted it must be shewn that this offence has been committed. There is no doubt that they and with them others assembled together in great numbers, but such an assembly to be unlawful must be tumultuous and against the peace. As far as these appellants are concerned there was nothing in their conduct when they were assembled together which was either tumultuous or against the peace. But it is said, that the conduct pursued by them on this occasion was such as on several previous occasions had produced riots and disturbance of the peace and terror to the inhabitants, and that the appellants, knowing when they assembled together that such consequences would again arise, are liable to this charge.

Now I entirely concede that everyone must be taken to intend the natural consequences of his own acts, and it is clear to me that if this disturbance of the peace was the natural consequence of acts of the appellants they would be liable and the justices would have been right in binding them over. But the evidence set forth in the case does not support this contention ; on the contrary, it shews that the disturbances were caused by other people antagonistic to the appellants, and that no acts of violence were committed by them.

In Hawkins' " Pleas of the Crown," s. 9, it is said : " An unlawful assembly according to the common opinion is a disturbance of the peace by persons barely assembling together with the intention to do a thing which if it were executed would make them rioters, but neither actually executing it nor making a motion toward the

execution of it." On this definition, standing alone, it is clear that the appellants were guilty of no offence, for it cannot be contended that they had any intention to commit any riotous act. The paragraph however continues thus: "But this seems to be much too narrow a definition. For any meeting whatever of great numbers of people, with such circumstances of terror as cannot but endanger the public peace and raise fears and jealousies among the king's subjects, seems properly to be called an unlawful assembly, as where great numbers, complaining of a common grievance, meet together, armed in a warlike manner, in order to consult together concerning the most proper means for the recovery of their interests; for no man can foresee what may be the event of such assembly." Examples are then given, but in each the circumstances of terror exist in the assembly itself, either in its object or mode of carrying it out, and there is the widest difference between such cases and the present. **What has happened here is that an unlawful organization has assumed to itself the right to prevent the appellants and others from lawfully assembling together,** and the finding of the justices amounts to this, that a man may be convicted for doing a lawful act if he knows that his doing it may cause another to do an unlawful act. There is no authority for such a proposition, and the question of the justices whether the facts stated in the case constituted the offence charged in the information must therefore be answered in the negative.

FIELD v. THE RECEIVER OF METROPOLITAN POLICE

(1907).

[1907] 2 K. B. 859; 76 L. J. K. B. 1015.

A number of youths assembled at nine o'clock at night on the pavement of Martindale Road, Canning Town, shouting and using rough language and by force knocked down about fifteen feet of wall adjoining the pavement. On its fall the caretaker of the premises came out into the street and the youths dispersed. By s. 2 of the Riot (Damages) Act, 1886, "Where a . . . building in any police district has been injured or destroyed . . . by any persons riotously and tumultuously assembled together, . . . compensation . . . shall be paid out of the police rate of such district

to any person who has sustained injury by such . . . destruction." The owners having brought an action under this section the County Court judge found that the youths assembled with the intention of knocking down the wall and that the mischief was done by the "riotous and tumultuous" conduct of the youths. *Held*, by the Divisional Court, that the conduct of the youths did not constitute a riot.

PHILLIMORE, J.—Riot is a crime, a misdemeanour at common law. The writer who appears to require the fewest elements to constitute this crime, and who, therefore, is the strongest authority in favour of the plaintiffs, is Lord Coke. He says that riot is where three or more do any unlawful act, as to beat any man, or to hunt in his park, or take possession of another man's land, or cut or destroy his corn, etc. This would seem to imply that any assault or malicious injury to property done by three or more is a riot. It is to be observed, however, that if this is Lord Coke's meaning, he stands alone; . . . Blackstone follows Coke in his definition of rout—a definition which has been since abandoned by text writers, and he nearly follows Coke in his definition of riot; but he makes it plain that there must always be force or violence to constitute a riot. Hawkins requires that the rioters should have an **intent mutually to assist one another against anyone who should oppose them in the execution of their enterprise,** and should actually execute the same in a violent and turbulent manner to the terror of the people (s. 1). A riot ought to be accompanied, he says, by some offer of violence either to the person of a man or to his possessions, as by beating him or forcing him to quit possession of his land or goods, etc. (s. 4); and there must be at least some such circumstances either of actual force or violence, or at least of an apparent tendency thereto, as are naturally apt to strike terror into the people (s. 5). Stephen says that an unlawful assembly must be (1) with intent to commit a crime by open force, or (2) with intent to carry out any common purpose in such a manner as to give firm and courageous persons reasonable ground to apprehend a breach of the peace, and a riot is an unlawful assembly which has actually begun to execute its purpose by a breach of the peace and to the terror of the public. In *R.* v. *Soley* (*a*) Lord Holt, C.J., says:

(*a*) 11 Mod. 100.

"If I am writing a letter and three or more come hallooing and jogging me, is this a riot? No; it ought to be *in terrorem populi*." In *R.* v. *Langford*, (*b*) where five persons were indicted for riot for ejecting an old man out of a cottage which they claimed, and then demolishing it, the conviction was supported because such force was used as to terrify the old man. . . . In *R.* v. *Cunninghame Graham*, (*c*) Charles, J., largely relying upon the passages in Hawkins, instructed the jury that "a riot is a disturbance of the peace by three persons at the least, who, with intent to help one another against any person who opposes them in the execution of some enterprise or other, actually execute that enterprise in a violent and turbulent manner to the alarm of the people."

From these passages we deduce that there are **five necessary elements of a riot—(1) number of persons, three at least; (2) common purpose; (3) execution or inception of the common purpose; (4) an intent to help one another by force if necessary against any person who may oppose them in the execution of their common purpose; (5) force or violence not merely used in demolishing, but displayed in such a manner as to alarm at least one person of reasonable firmness and courage.** In this case element No. 1 was present. As to elements Nos. 2 and 3, there was evidence upon which the learned judge could have found their existence, though, as far as we can judge from the notes of the evidence and without seeing the witnesses, we think we should not have found the same way. But as to elements Nos. 4 and 5 there is no evidence. The youths ran away as soon as the single caretaker came forward; there is no reason to suppose that they would have resisted if he had come forward earlier and required them to desist. It is true that the caretaker's wife was frightened by the noise of the falling wall, but no one says that he was alarmed by the youths, though the witnesses may have been frightened by other youths on other occasions. Nor was the conduct of the youths such as would be calculated to alarm persons of reasonable firmness and courage. We cannot hold that there was a riot.

(*b*) C. & M. 602. (*c*) 16 Cox C. C. 420.

R. v. ADAMS

(1887).

22 Q. B. D. 66; 58 L. J. M. C. 1.

The prisoner seeing in a newspaper an advertisement by a young woman for a situation wrote to her a letter containing a proposal of immoral conduct. The letter did not reach the advertiser, but was opened by her mother, who handed it to the police. The prisoner was convicted on an indictment which charged him with having unlawfully and maliciously written and published to the advertiser a defamatory letter of and concerning her and of and concerning her character for virtue and modesty. *Held*, that the conviction could be sustained because the letter might reasonably tend to provoke a breach of the peace.

Lord Coleridge, C.J.—It appears to me that there is a very short and plain ground upon which this conviction can be sustained. It is a conviction upon an indictment the third count of which charges that the letter there set out is a defamatory libel tending to defame and bring into contempt the character of the person to whom it was sent. I am of opinion that the letter is of such a character as that it tended to provoke a breach of the peace. At all events, **the sending of such a letter** to the person to whom it was sent **might**, under the circumstances of her position and character, **reasonably or probably tend to provoke a breach of the peace** on her part, or on the part of those connected with her. The jury must be taken to have found that it was a defamatory libel which was calculated to cause a breach of the peace; and on that short ground I am of opinion that the conviction must be affirmed on the third count of the indictment.

JONES v. HULTON & CO.

(1909).

[1909] 2 K. B. 444; 79 L. J. K. B. 198.

The defendants published in their newspaper an article purporting to be an actual description of motor races at Dieppe. The writer of this descriptive sketch had used the following language: "'Whist, there goes A. J. with a woman who is not his wife, who must be, you know—the other thing!' whispers a fair neighbour of mine." The article went on to contrast the conduct of A. J. at Dieppe with his more austere behaviour

at home. The name A. J. was an uncommon one and used by the writer of the article and the defendants in the belief that it was not likely to be that of an existing individual. However, a gentleman possessing that name brought an action for libel and produced witnesses to say that on reading the article they thought that it referred to him. The jury found that the article described an actual scene and an actual person. *Held*, that the plaintiff was entitled to succeed.

Lord Alverstone, C.J.—It was contended by the defendants that inasmuch as it must be taken that there was no intention to refer to the plaintiff, and that the only words which could connect the article with him were the name Artemus Jones, the action could not be maintained, inasmuch as the plaintiff failed to prove that the defendants falsely and maliciously published the libel of and concerning the plaintiff; but this contention in my opinion involves a fallacy. If an untrue and defamatory statement in writing is published without lawful excuse, and in the opinion of the jury upon the evidence it refers to the plaintiff, the cause of action is made out: see notes to Bullen and Leake, 3rd ed., p. 304. No one doubts that the averment that the libel was written of and concerning the plaintiff is a material averment. The authorities cited by my brother Fletcher Moulton establish that proposition, but in my opinion no authorities are necessary; it has been so held for generations; but here the averment was made, and the question is whether the averment was proved; and that, as well as the innuendo founded thereon, was for the jury upon the evidence. . . . It is in my opinion clearly established by authorities, to some of which I will refer, that the question, if it be disputed, whether the article is a libel upon the plaintiff is a question of fact for the jury; and in my judgment this question of fact involves not only whether the language used of a person in its fair and ordinary meaning is libellous or defamatory, but **whether the person referred to in the libel would be understood by persons who knew him to refer to the plaintiff.** This proposition is so well established that, but for the grave and strenuous argument addressed to us on behalf of the defendants, I should not have thought it necessary to refer at any length to the authorities which support the proposition. It was, however, contended that there was a distinction between the identity of the person supposed to be referred to in the article and the defamatory

language used about that person. I know of no case in which this distinction has been drawn, but it seems to me, both upon authority and principle, that, both on the question of whether the alleged libel refers to the plaintiff and as to the meaning of the language used, the question is for the jury upon the evidence before them.

It seems to me that a very brief consideration will shew that on principle this must be so. Take the case of a libel which uses a name; that name may or may not be conclusive as to the person to whom the libel is intended to refer. Just in the same way, if the libel speaks of a person by description without mentioning the name, in order to establish a right of action the plaintiff must prove to the satisfaction of a jury that ordinary readers of the paper who knew him would have understood that it referred to him. There is abundant authority to shew that **it is not necessary for everyone to know to whom the article refers;** this would in many cases be an impossibility; but **if in the opinion of a jury a substantial number of persons who knew the plaintiff, reading the article, would believe that it referred to him,** in my opinion an action, assuming the language to be defamatory, can be maintained; and it makes no difference whether the writer of the article inserted the name or description unintentionally, by accident, or believing that no person existed corresponding with the name or answering the description. **If upon the evidence the jury are of opinion that ordinary sensible readers, knowing the plaintiff, would be of opinion that the article referred to him, the plaintiff's case is made out. . . .**

It was alleged by the defendants that the article on the face of it related to a fictitious person and that no reasonable person could think that the article referred to anyone. This was in my opinion for the jury, but there certainly was evidence from the article itself that the writer was purporting to describe that which he had himself seen and people whom he had himself observed. . . . Dealing now with the authorities, it is, I think, beyond dispute that, **apart from the question of express malice, the intention or motive with which the words are used is immaterial,** and that, if in fact the article does refer, or would be deemed by reasonable people to refer, to the plaintiff, the action can be maintained and proof of express malice is wholly unnecessary: see Lord Bramwell in *Abrath*

v. *N. E. Ry.*, (*a*) in which the following passage occurs: "That unfortunate word 'malice' has got into cases of actions for libel. We all know that a man may be the publisher of a libel without a particle of malice or improper motive. Therefore the case is not the same as where actual and real malice is necessary. Take the case where a person may make an untrue statement of a man in writing, not privileged on account of the occasion of its publication; he would be liable although he had not a particle of malice against the man. So would a corporation. Suppose that a corporation published a newspaper or printed books, and suppose that it was proved against them that a book so published had been read by an officer of the corporation in order to see whether it should be published or not, and that it contained a libel; an action lies there, because there is no question of actual malice or ill-will or motive." **What is passing in the mind of the writer is wholly immaterial, or what was his intention, if he has in fact published a libel upon the plaintiff:** see the cases collected in cap. v. of "Odgers on Libel" and the judgment in *Bourke* v. *Warren*, (*b*) where Abbott, C.J., in summing up to the jury said: "The question for your consideration is, whether you think the libel designates the plaintiff in such a way as to let those who knew him understand that he was the person meant. It is not necessary that all the world should understand the libel; it is sufficient if those who know the plaintiff can make out that he is the person meant." The judgment of the House of Lords in *Le Fanu* v. *Malcomson* involved the same proposition, and in my opinion the statement of the law by Lord Blackburn in the case of *Capital and Counties Bank* v. *Henty* (*c*) is conclusive on the point: "In construing the words to see whether they are a libel the Court is, where nothing is alleged to give them an extended sense, to put that meaning on them which the words would be understood by ordinary persons to bear, and say whether the words so understood are calculated to convey an injurious imputation. The question is not whether the defendant intended to convey that imputation; for if he, without excuse or justification, did what he knew or ought to have known was calculated to injure the plaintiff, he must (at least civilly) be responsible for the consequences though his object

(*a*) 11 A. C. 247. (*b*) 2 C. & P. 309. (*c*) 7 A. C. 741.

might have been to injure another person than the plaintiff, or though he may have written in levity only."

R. v. MUNSLOW

(1895).

[1895] 1 Q. B. 758; 64 L. J. M. C. 138.

By s. 5 of the Libel Act, 1843, "any person who shall maliciously publish any defamatory libel," is punishable by fine and one year's imprisonment. An indictment charged M. with "unlawfully" publishing a defamatory libel but did not aver that it was published "maliciously." *Held*, that the section did not create a new offence but merely fixed the punishment for a common law offence, that at common law an averment of malice was not necessary and that the indictment was therefore good.

Lord Russell of Killowen, C.J.—This indictment charges the defendant in each count with having unlawfully written and published a defamatory libel, the word "maliciously," which is commonly used in such indictments, being omitted; had the words "unlawfully and maliciously" been employed the case would not now be before us. For myself, I must say that, in my opinion, it would be a deplorable, if not an absurd, state of the law if such an omission could not be cured by verdict. However, an objection was taken before the case went to the jury, which was in effect that the indictment was bad and the question for us to consider is whether it was bad. That the case was intended to be presented to the jury as being within s. 5 of the Libel Act, 1843, is clear; it was so presented to them; but how and for what purpose? What is the true effect of the section? It provides that if any person maliciously publishes a defamatory libel he shall, being convicted thereof, be liable to fine or imprisonment or both; the section does not therefore, as its language shews, create a new offence, nor does it purport to give a definition of an existing offence, but it provides for the application to that which was already an offence at common law of the appropriate punishment on conviction for that offence. It follows, therefore, that cases in which the offences dealt with are the creations of statute and are defined by particular statutory language, many of which have been cited to us, have no pertinence to the

point raised before us to-day. The word "maliciously" was introduced into the section in order to prevent the section working great injustice. **Anyone who publishes defamatory matter of another tending to damage his reputation or expose him to contempt and ridicule is guilty of publishing a defamatory libel, and the word "maliciously" was introduced in order to shew that, though the accused might be primâ facie guilty of publishing a defamatory libel, yet if he could rebut the presumption of malice attached to such publication he would meet the charge.** For example, upon the production of the alleged libel, it is for the **judge** to determine whether it is **capable** of being regarded as a libel by the jury; his function is then ended, and if the jury determine it to be a libel, then, in the absence of evidence of the motive for publication, the law attaches to the fact of publication the inference that the publication was malicious. But the accused may be able to shew that, though the matter is defamatory, it was published on a privileged occasion, or he may be able to avail himself of the statutory defence that the matter complained of was true, and that its publication was for the public benefit; and those classes of cases were meant to be excluded from the purview of the section by the use of the word "maliciously."

Here the case went to the jury after the objection was taken, and we must assume that the language was capable of bearing the innuendoes placed on it and was capable of being a libel, that the jury found that it was in fact a libel, and that there was no lawful excuse, such as privilege, for its publication. In that state of facts is the prisoner to be absolved from the consequences of the verdict, and is the conviction to be quashed merely because the word "maliciously" has been omitted from the indictment? The argument for the defendant is in effect that the indictment is an indictment under the statute, and is in respect of an offence under the statute; but, in my judgment, that is a mistaken view; the indictment is for a common law offence, but is so framed as to bring it within the section for the purpose of punishment. If that is so, is the indictment bad for omitting the word "maliciously"? It is common ground that the rules of pleading in civil and criminal cases do not differ; if, therefore, the authorities shew that in an action for libel the declaration is good on demurrer, although the word

"maliciously" is omitted, that would be an authority for holding that an indictment is not bad by reason merely of omitting it. No doubt the law implies malice from the publication of defamatory matter; but that implication, as I have already said, may be rebutted.

The first authority to which I need refer is *R.* v. *Harvey.* (*a*) In that case the defendants were indicted for a libel imputing mental insanity to George IV, and though the point was not taken upon an objection to the indictment the language of the judges upon a motion for a new trial on the ground of misdirection throws light upon the subject. The jury at the trial required to know from the Lord Chief Justice whether it was necessary that there should be a malicious intention in order to constitute a libel, and the answer given was: **"The man who publishes slanderous matter, in its nature calculated to defame and vilify another, must be presumed to have intended to do that which the publication is calculated to bring about, unless he can shew the contrary."** Upon the motion for a new trial Bayley, J., said that in his opinion the direction was right, and that the falsely making the assertion made by the defendants was evidence that they made it maliciously. The language of Holroyd, J., is more direct as to the necessity of an allegation of malice. He says: "It is not necessary to aver in such an indictment any direct malice because the doing of such an act without any excuse is indictable;" . . .

That case was followed by *Bromage* v. *Prosser,* (*b*) which was an action for slander; but on this point there is no difference between actions for slander and for libel. In delivering the judgment of the Court, Bayley, J., says: . . . "In an ordinary action for words, it is sufficient to charge that the defendant spoke them falsely; it is not necessary to state that they were spoken maliciously. . . . I need only refer to one more case, that of *Heymann* v. *Reg.,* (*c*) where it is laid down that at common law there is no distinction between the pleadings in civil cases and criminal cases; the general principle therefore is, that civil and criminal pleadings are the same where the criminal proceedings are not taken under a statute defining the offence in particular language. I have come therefore to the

(*a*) 2 B. & C. 257. (*b*) 4 B. & C. 247. (*c*) L. R. 8 Q. B. 102.

conclusion that this indictment is perfectly good ; it would be monstrous if it were held bad. For myself I should be ready, if it were necessary, to say that an averment that a defendant "unlawfully wrote and published " a defamatory libel may, when it is being considered after verdict, be treated as an imperfect averment. I do not decide, however, upon that ground, but upon the ground that the indictment is good, that it is not in respect of an offence under or created by the section, and that the true view of the section is that it enjoins the character of the punishment to be awarded to an existing offence.

R. v. PEASE

(1832).

4 B. & Ad. 30.

By 1 & 2 Geo. IV, c. 44, a company was incorporated for the purpose of making a railway, and in the statute it was provided that the railroad should not deviate more than 100 yards from a course laid down in a map deposited with the clerk of the peace. By s. 8 of 4 Geo. IV, c. 33, it was enacted that " it shall be lawful for the said company . . . to make and erect such and so many locomotive or moveable engines as the said company shall . . . think proper and expedient and to use and employ the same in or upon the said railway." The railway ran parallel to an ancient highway, being in some places within five yards of it, and as a result horses and persons using the highway were frightened. *Held*, that the company was not indictable for a nuisance since the statute gave an unqualified authority for the use of the engines.

PARKE, J.—**The case turns upon the meaning of the** eighth section of the **statute** 4 Geo. IV, c. 33, and the question is, whether that section gives an authority to the company to use locomotive engines on the railway absolutely, or only with some implied condition or qualification that they should employ all practicable means to protect the public against any injury from them ? . . . Now **the words of the clause** in question **clearly give to the company the unqualified authority to use the engines ;** and we are to construe provisions in Acts of Parliament according to the ordinary sense of the words, unless such construction would lead to some unreasonable result, or be inconsistent with, or contrary to, the declared or implied intention of the framer of the law, in which

case the grammatical sense of the words may be extended or modified; . . .

Let us, then, consider whether there is anything unreasonable, or contrary to the express or implied intention of the legislature, in construing these words in their ordinary sense, and without any such condition or qualification as before mentioned. It is clear that the makers of this, and the prior Act, had in view the construction of a railroad (with its branches) in a certain defined line which . . . had been delineated on a map, deposited with the clerk of the peace, and from which line the road was not to deviate more than 100 yards, and not into the grounds of persons not mentioned in the book of reference. The legislature, therefore, must be presumed to have known that the railroad would be adjacent for a mile to the public highway, and consequently that travellers upon the highway would be, in all probability, incommoded by the passage of locomotive engines along the railroad. That being presumed, there is nothing unreasonable or inconsistent in supposing that the legislature intended that the part of the public which should use the highway should sustain some inconvenience for the sake of the greater good to be obtained by other parts of the public in the more speedy travelling and conveyance of merchandise along the new railroad. . . . It is true that the same object, that of giving one part of the public the benefit of the use of these engines, might have been effected without the same injury to the other part using the road, if the act had imposed on the company the obligation of erecting a sufficient fence or screen, at their own cost; or had provided that the line of road should be different at that place; but it is by no means necessary to imply such an obligation in order to make the clause reasonable and consistent, for it has been shewn to be so without it; and it is natural to suppose that if such a condition had been intended it would have been particularly expressed.

For these reasons, we think that the defendants were justified under the above-mentioned section of the 4 Geo. IV, and therefore that the judgment of the Court should be in their favour.

R. v. THE BRADFORD CANAL COMPANY

(1865).

6 B. & S. 631 ; 34 L. J. Q. B. 191.

The Bradford Canal Company was empowered by statute to make a canal and supply it with water from certain streams and to make reservoirs and do all things necessary for the navigation of the canal. The water taken to supply the canal was at first pure, but owing to the growth of the town of Bradford it became so foul and polluted that the canal became a public nuisance. The Company demised the canal in this state. *Held*, that their lessees were liable to an indictment for nuisance.

CROMPTON, J.—The indictment charges the defendants with a public nuisance by collecting and keeping exposed in their canal foul and polluted water. It is clear that they did take and collect the water of the Bradford Beck and bring it into the head of their canal, so that filth and mud were collected there and an undoubted nuisance caused. The foul water was more stagnant in the canal than it would have been in the beck, and the defendants are liable unless they are authorized by some statute to create this nuisance. The lessees may justify as the Company might under the powers of the Act of Parliament. But is there any provision in the Act that the Company may commit a nuisance ? Whether an authority is given or duty imposed depends on the intention of the Legislature. Here the Company are authorized to take the water of certain becks and make a canal ; but that does not involve their bringing feculent matter and allowing it to accumulate in their canal so as to be a nuisance.

BLACKBURN, J.—There is no precise authority in point ; and we must have recourse to the general principle of law. Persons who maintain their property so as to be a public nuisance are indictable ; and the question in the present case, which concerns the occupiers, the lessees of the canal, is whether, they having maintained and kept part of it in such a state as to be a public nuisance, there is anything which prevents them from being indictable ? The answer is that they had the right to take the water from the Bradford Beck (there is no distinction between it and the others), which in its natural state was pure, and that it had become foul by filth poured into it from the drains of persons living in the

neighbourhood, so that the defendants, taking it in that condition, caused this nuisance. If they were enjoined by Act of Parliament to take the water of the beck, and others had converted it into a sewer and it was impracticable to separate the foul parts, the present case would be within *R.* v. *Pease* (4 B. & Ad. 30). Then the defendants would have a good answer to the indictment. **But assuming that the defendants take the water under the direction of the Legislature, these enactments are only permissive;** the defendants are not authorized or enjoined to take water in such a state as to make the canal a nuisance. Inconvenience to the public and to the Company may be occasioned if, from the want of pure water, the supply of water in the canal runs short, but that can afford no justification for the defendants creating a nuisance.

SHEE, J.—*R.* v. *Pease* is distinguishable: there the Act of Parliament **authorized** the nuisance, viz. the use of locomotive steam-engines in the way and the place in which and where their use was a nuisance. But if a new mode of using locomotive engines had been afterwards discovered, producing effects different and much more injurious to the public than the effect of engines constructed and worked at the time when the Act passed, that would be a nuisance not within the contemplation of the Legislature, and not authorized by the Act.

R. v. CARLILE

(1834).

C. & P. 636.

A Fleet Street bookseller was distrained on for refusing to pay church rates. In order to call attention to his grievances he exhibited in his window effigies representing the devil, a bishop, and a broker. In consequence of this display crowds gathered and obstructed the highway. *Held*, that he was indictable for a nuisance.

PARKE, J.—The gravamen of a charge like this is . . . whether the defendant, by the exhibition of them [the effigies] at his windows, caused the footway of Fleet Street to be obstructed, so that the

public could not pass as they ought to do; and the main question is, whether His Majesty's subjects have been annoyed in this respect. . . . The defendant says, that if his neighbour be injured he ought to bring his action. No doubt, if a man does an act which injures a particular neighbour he is not liable to be indicted if no one else but that neighbour be injured; but **if a place is situate near a highway and the defendant do that which causes the persons passing to be prevented from passing as they ought to do, and, besides this, people are annoyed in the occupation of their houses, this is a nuisance, for which the party is indictable.** It may be said that Mr. Gray, the coach proprietor, takes up passengers at his coach office; but if he does he must do it in a reasonable time; and Lord Ellenborough draws this very distinction, for he says in the case, of *R.* v. *Cross*, (*a*) a stage coach may set down and take up passengers in the street, this being necessary for public convenience, but it must be done in a reasonable time. And in another case, *R.* v. *Jones*, (*b*) Lord Ellenborough said: "If an unreasonable time is occupied in the operation of delivering beer from a brewer's dray into the cellar of a publican, this is certainly a nuisance; a cart or wagon may be unloaded at a gateway, but this must be done with promptness. So as to the repairing of a house, the public must submit to the inconvenience occasioned necessarily in repairing the house; but if this inconvenience is prolonged for an unreasonable time, the public have a right to complain, and the party may be indicted for a nuisance." There is no doubt that a tradesman may expose his wares for sale; but he must do it in such a way as not by so doing to cause obstruction in the public streets. In the case of *R.* v. *Russell*, the party was merely exercising his lawful trade, and he used to let packages stand on the footpath. He was held indictable; but if he had merely carried his packages out he would not have been liable to have been prosecuted. In the case of *R.* v. *Cross* (*c*) Lord Ellenborough uses the words "unauthorized obstruction." Were not these figures unauthorized? . . . In the present case one question is, whether this act of the defendant was at all necessary for the *bonâ fide* carrying on of his trade; for if it was, and he did not take up more time in the doing of it than

(*a*) 3 Camp. 224. (*b*) 3 Camp. 230. (*c*) 6 East 427.

was necessary, the law would do what it could to protect him. Now the defendant is so far from thinking that this exhibition is essential to the carrying on of his trade, that he has told us to-day that he considers his trade to be injured by it. . . . **The defendant has asked whether he has not a right to do what he will on his own premises? No doubt he has, but he must not do anything there that injures his neighbours, so as to be a private nuisance, nor anything which annoys the public, which is a public nuisance.** . . . If this be a nuisance, the defendant ought to be convicted; and **if there were 500 other nuisances, they will not justify this** (*d*). The question therefore really is, whether you think the defendant has, by the acts proved, caused an obstruction of the public highway to the nuisance of persons passing along that way, and to the persons residing in that neighbourhood.

R. v. TRAIN

(1862).

2 B. & S. 640; 31 L. J. M. C. 169.

The defendant without authority laid down in a London street a double line of tramways which, owing to their construction, frightened horses and caused the wheels of vehicles crossing them to skid. *Held*, that this was a public nuisance, even though the tramways might be for the convenience of the public generally.

CROMPTON, J.—We are strongly of opinion that this conviction was right. . . . Our judgment proceeds on these short grounds. It was clearly shewn by the evidence, and is established by the finding of the jury, that these tramways were a nuisance, dangerous and mischievous to passengers on the highway; and the defendants, by whom they were constructed, are therefore responsible for that nuisance, unless Mr. Bovill succeeds in establishing the proposition for which he contends. He tried to distinguish the present case from those which have settled the law that you cannot, for the benefit of one part of the public, interfere with the rights of

(*d*) The defendant, who appeared in person, had attempted to justify himself by the allegation that the obstruction of the highway by persons looking at displays in shop windows or at processions passing along the street was a matter of frequent occurrence.

passage of the rest over land or water. I understand him to admit that these tramways would be a nuisance to travellers passing across them, but he contended that, taking all the facts together, it was a question for the jury whether they were a nuisance, or whether what was done was not a reasonable and convenient arrangement for the use of the highway by the public generally. Supposing, however, for the present that his proposition that an arrangement for the use of a highway in a particular manner being for the advantage of the public generally would be an answer to an indictment for that arrangement, this case does not come within that principle, seeing that this was not an arrangement for the ordinary use of the highway, and is very distinguishable from the cases he put. It may fairly be said, for instance, that the raising of a portion of a highway for the use of passengers is allowable; but that is for the use of the highway *quâ* highway. And I do not say that there may not be cases where arrangements for the advantage of one class of persons may be allowable though mischievous to another class. But what has been done here is not making any arrangement for the use of the highway in the ordinary manner of using a highway. On the contrary, it is withdrawing so much of the highway from its ordinary use as such; for it is idle to say that you can use as an ordinary part of this highway the portion taken up by the tramways. A carriage meeting an omnibus running on one of them cannot give and take the road. The case is like that of *R.* v. *The United Kingdom Electric Telegraph Company Limited*, which we have just disposed of, and others of a similar nature. It also falls within *R.* v. *Longton Gas Company Limited* (29 L. J. M. C. 118), with which we took a good deal of pains, where a gas company, without being authorized by a statute, opened trenches in the streets of a town for the purpose of laying down gas pipes, and this was adjudged a nuisance. **If persons wish for power to act as the defendants acted here, they must take the usual regular and constitutional course of getting the protection of the Legislature.**

Then was there any evidence to go to the jury that this was a proper use of the highway? I think not. It was put that these tramways would enable persons to pass conveniently from A to B. So would a railway; but the defendants would clearly not be

justified in making one in a highway without the authority of Parliament.

R. v. NEIL

(1826).

2 C. & P. 485.

N. was indicted for causing a nuisance by smells arising from carrying on the trade of a varnish maker at Islington. The defence was (1) that the smells were not injurious to health; (2) that there were many other smells in the neighbourhood and that, though the accumulations of all these smells was offensive, yet the defendant's alone would not have been so, and therefore was no nuisance.

ABBOTT, C.J.—It is not necessary that a public nuisance should be injurious to health; if there be smells offensive to the senses, that is enough, as the neighbourhood has a right to pure and fresh air. It has been proved that a number of other offensive trades are carried on near the place . . . **but the presence of other nuisances will not justify any one of them;** or the more nuisances there are, the more fixed they would be; however, one is not the less subject to prosecution because others are culpable. The only question therefore is this: Is the business as carried on by the defendant productive of smells offensive to persons passing along the public highway?

BROWN v. PATCH

(1899).

[1899] 1 Q. B. 892; 68 L. J. Q. B. 588.

Patch, who was a bookmaker, entered enclosed grounds in which horse races were being carried on, and put up a bamboo structure about five or six feet high, supported on four legs. On the top was a board on which was painted "Bob Patch, London. All in run or not—pay first past the post." On this board the odds against the different horses were written before each race. Patch stood on a box near this structure and carried on his business. *Held*, that he had used a "place for the purpose of betting with persons resorting thereto" within the meaning of s. 1 of the Betting Act, 1853.

CHANNELL, J.—The law has now been fairly well settled by the decision of the House of Lords in the *Kempton Park Case.* (*a*) I

(*a*) [1899] A. C. 143.

think there is no difficulty in understanding what is the law and what is the interpretation of the statute ; but there is considerable difficulty in applying it in particular cases. **The statute seems clearly to be directed against betting places, not against betting persons.** Clearly, also, it does not forbid persons using a place by going there and meeting and betting with each other. Nor does it forbid keeping a place where persons may meet and bet with each other. Nor does it forbid carrying on the business of betting with anyone who will bet with you. But **it does forbid carrying on the business of keeping an office or place to which people may come and bet with you.** The judgments in the case in the House of Lords clearly shew that that is the matter to be considered. The important question is not so much what is a place ? but what is the character of the user of it ? and although the words used are " house, office, room, or other place," and it is clear that, according to the ordinary rule, " place " must be something *ejusdem generis* with " house, office, room," yet the analogy is with respect to the way the place is used rather than with respect to the way in which it is constructed. I think those propositions are clearly brought out in the judgments delivered in the House of Lords, and especially in the passages in the judgments of the Lord Chancellor and of Lord James of Hereford to which my brother Darling has referred. If a man, as was done here, uses certain apparatus with his name on it, and a statement of the odds he is prepared to lay, that apparatus may be used only to indicate his identity, and that he is willing to bet with anybody who will bet with him. If the apparatus is used for those purposes only, it does not in any way localize his business of betting, or bring him within the provision of the Act. But if it be used to indicate the **place at which there is a man to be found** who will bet with anyone who will come and bet with him **there**, then that apparatus becomes an extremely important and valuable matter to consider. In each case the facts must be looked at, to see whether the bamboo stage or the umbrella, or whatever it is that the man has got, is being used by him merely to indicate that he is prepared to bet with anybody who will bet with him, or whether he is using it to indicate that there is a **place at which the business of betting is carried on by him, and to which,**

therefore, people can go for the purpose of betting with him. With respect to the decisions which have been cited to us, the question in each case being, what is the proper inference to be drawn from the particular facts? although it is useful and valuable to see what inferences learned judges have drawn from particular facts in cases which have come before them, their decisions are not quite like binding decisions on a point of law. The question, after all, is a question of fact in each case—whether you come to the conclusion that there has been a user of a place, analogous to the user of a place like a betting office, at which the person who keeps or uses that place is prepared to bet with people who come there and bet with him. In the present case I think the facts are sufficient to bring it within the statute, and that the inference ought to be drawn that what the respondent did was not merely indicating that he was using that place as a place where he could be found and was carrying on his business. **He was localizing his business there,** with the object of attracting people there, and to prevent them from having to look for him all over the grounds. If that inference be drawn, this case is clearly brought within the principle of the decisions which have been held by the House of Lords to be good. Guided very considerably, of course, by the views taken by the judges who decided *Shaw* v. *Morley* (*b*) and *Bows* v. *Fenwick* (*c*) I come to the conclusion upon the facts of this case that the inference ought to be drawn that the respondent's business was localized, and that consequently he was brought within the terms of the statute. Upon these grounds I am of opinion that the magistrates ought to have convicted, and that the case should be sent back with a direction that they ought to convict.

R. v. PRICE

(1884).

12 Q. B. D. 247; 53 L. J. M. C. 51.

Charge of Stephen, J., to the grand jury. [The facts appear from the charge.]

STEPHEN, J.—One of the cases to be brought before you is so

(*b*) L. R. 3 Ex. 137. (*c*) L. R. 9 C. P. 339.

singular in its character, and involves a legal question of so much novelty and of such general interest, that I propose to state at some length what I believe to be the law upon the matter. I have given it all the consideration I could, and I am permitted to say that, although I am alone responsible for what I am about to say to you, Lord Justice Fry takes the same view of the subject as I do, and for the same reasons.

William Price is charged with a misdemeanour under the following circumstances: He had in his house a child five months old, of which he is said to have been the father. The child died and Price, as it seems, did not register its death. The coroner accordingly gave him notice on Saturday, the 12th of January, 1884, that unless he sent a medical certificate of the cause of the child's death he would hold an inquest on the body on the following Monday. Price on the Monday afternoon took the body of the child to a field of his own, some distance from the town of Llantrissant, put it into a ten-gallon cask of petroleum and set the petroleum on fire. A crowd collected, the body of the child, which was burning, was covered with earth, and the flames extinguished, and Price was brought before the magistrates and committed for trial. He will be indicted before you on a charge which in different forms imputes to him as criminal two parts of what he is said to have done. Namely, first, his having prevented the holding of an inquest on the body; and, secondly, his having attempted to burn the child's body.

With respect to the prevention of the inquest the law is, that it is a misdemeanour to prevent the holding of an inquest which ought to be held by disposing of the body. It is essential to this offence that the inquest which it is proposed to hold is one which ought to be held. The coroner has not an absolute right to hold inquests in every case in which he chooses to do so. It would be intolerable if he had power to intrude without adequate cause upon the privacy of a family in distress and to interfere with their arrangements for a funeral. Nothing can justify such interference except a reasonable suspicion that there may have been something peculiar in the death, that it may have been due to other causes than common illness. In such cases the coroner not only may, but ought to hold an inquest,

and to prevent him from doing so by disposing of the body in any way—for an inquest must be held on the view of the body—is a misdemeanour. The depositions in the present case do not very clearly shew why the coroner considered an inquest necessary. If you think that the conduct of Price was such as to give the coroner fair grounds for holding one, you ought to find a true bill, for beyond all question Price did as much as in him lay to dispose of the body in such a manner as to make an inquest impossible.

The other fact charged as criminal is the attempt made by Price to burn the child's body, and this raises, in a form which makes it my duty to direct you upon it, a question which has been several times discussed and has attracted some public attention, though so far as I know no legal decision upon it has ever been given, the question, namely, whether it is a misdemeanour at common law to burn a dead body instead of burying it. . . .

The question arises in the present case in a perfectly clear and simple form, unembarrassed by any such consideration as applied to the other cases to which I have referred. There is no question here of the illegality and dishonesty which marked the conduct of those who were described as resurrection men, nor of the artifices, not indeed criminal but certainly disingenuous, by which possession of the body was obtained in the cases of *R.* v. *Sharpe* (*a*) and *Williams* v. *Williams* (*b*). Price had lawful possession of the child's body, and it was not only his right, but his duty, to dispose of it by burying or in any other manner not in itself illegal. Hence I must consider the question, whether to burn a dead body instead of burying it is in itself an illegal act.

After full consideration, I am of opinion that a person who burns instead of burying a dead body does not commit a criminal act, unless he does it in such a manner as to amount to a public nuisance at common law. My reason for this opinion is that upon the fullest examination of the authorities, I have, as the preceding review of them shews, been unable to discover any authority for the proposition that it is a misdemeanour to burn a dead body, and in the absence of such authority I feel that I have no right to declare it to be one.

(*a*) 20 Ch. D. 659. (*b*) 1 D. & B. 160.

There are some instances, no doubt, in which courts of justice have declared acts to be misdemeanours which had never previously been decided to be so, but I think it will be found that in every such case the act involved great public mischief or moral scandal. It is not my place to offer any opinion on the comparative merits of burning and burying corpses, but before I could hold that it must be a misdemeanour to burn a dead body, I must be satisfied not only that some people, or even that many people, object to the practice, but that it is, on plain, undeniable grounds, highly mischievous or grossly scandalous. Even then I should pause long before I held it to be a misdemeanour, for many acts involving the grossest indecency and grave public mischief—incest for instance, and where there is no conspiracy, seduction, or adultery—are not misdemeanours, but I cannot take even the first step. Sir Thomas Browne finishes his famous essay on Urn Burial with a quotation from Lucan, which, in eight words, seems to sum up the matter: "*Tabesne cadaver solvat an rogus hand refert.*" Whether decay or fire consumes corpses matters not. The difference between the two processes is only that one is quick, the other slow. Each is so horrible that every healthy imagination would turn away from its details; but one or the other is inevitable, and each may be concealed with the subject which everyone would wish to treat with respect and tenderness, and I suppose there is no doubt that, as a matter of historical fact, the disuse of burning bodies was due to the force of those sentiments. I do not think, however, that it can be said that every practice which startles and jars upon the religious sentiments of the majority of the population is for that reason a misdemeanour at common law. The statement of such a proposition, in plain words, is a sufficient refutation of it, but nothing short of this will support the conclusion that to burn a dead body must be a misdemeanour. As for the public interest in the matter, burning, on the one hand, effectually prevents the bodies of the dead from poisoning the living. On the other hand, it might no doubt destroy the evidence of crime. These, however, are matters for the legislature and not for me. It may be that it would be well for Parliament to regulate or to forbid the burning of bodies, but the great leading rule of criminal law is that nothing is a crime unless it is

plainly forbidden by law. This rule is no doubt subject to exceptions, but they are rare, narrow, and to be admitted with the greatest reluctance, and only upon the strongest reasons.

This brings me to the last observation I have to make. Though I think that to burn a dead body decently and inoffensively is not criminal, it is obvious that if it is done in such a manner as to be offensive to others it is a nuisance of an aggravated kind. A common nuisance is an act which obstructs or causes inconvenience or damage to the public in the exercise of rights common to all Her Majesty's subjects. To burn a dead body in such a place and such a manner as to annoy persons passing along public roads or other places where they have a right to go is beyond all doubt a nuisance, as nothing more offensive both to sight and to smell can be imagined. The depositions in this case do not state very distinctly the nature and situation of the place where this act was done, but if you think upon inquiry that there is evidence of its having been done in such a situation and manner as to be offensive to any considerable number of persons, you should find a true bill.

Note.—The burning of dead bodies is now governed by the Cremation Act, 1902, which provides penalties for any infringement of the regulations in the Act, and also provides that nothing therein contained shall authorize the creation or permission of a nuisance.

R. v. BROWN

(1870).

L. R. 1 C. C. R. 244; 39 L. J. M. C. 94.

The body of the prisoner's child was found in a field used for grazing cattle near a wall four and a half feet high, which separated the field from a private yard at the back of a public-house. The prisoner did not live at the public-house, but, in order to throw the body into the field, entered the yard by a narrow passage from the street. There was no path across the field and the body could only have been seen by a person searching for it, or, as in fact had happened, by accident. The body was not in any way concealed otherwise than by its situation. *Held*, that there was evidence for the jury of a "secret disposition" of the body within s. 60 of the Offences against the Person Act, 1861.

BOVILL, C.J.—The first question is whether there is any evidence

of a "secret disposition" of the body within the statute 24 & 25 Vict. c. 100, s. 60. It seems to me that **what is a secret disposition must depend upon the circumstances of each particular case.** The most complete exposure of the body might be a concealment. As, for instance, if the body were placed in the middle of a moor in the winter, or on the top of a mountain, or in any other secluded place, where the body would not be likely to be found. There would in such a case be a secret disposition of the body, and the jury must say, in each case, whether or not the facts shew that there has been such a disposition. In this case there was abundant evidence to go to the jury that the body had been disposed of secretly. The evidence of a secret disposition consisted in the situation in which the body was placed, and it was a question for the jury to say whether placing the body in such a situation was in fact a secret disposition of the body. It is easy to suggest cases where placing a body in a particular situation would undoubtedly be evidence of a secret disposition, as if a body were thrown down from a cliff to the sea-shore in a secluded place. If, however, the place were very much frequented, there might be no evidence of a secret disposition from such an act. There must no doubt be an intent to conceal the body, but here there is no question as to the intent.

R. v. ANDERSON

(1868).

L. R. 1 C. C. R. 161; 38 L. J. M. C. 12.

A., an American citizen, was indicted at the Central Criminal Court for murder on board a Nova Scotian ship registered in London and sailing under the British flag. At the time of the offence the vessel was within the empire of France, being about forty-five miles up the river Garonne; the river was at that place half a mile wide and the tide flowed beyond the place. *Held*, that the ship was within the Admiralty jurisdiction and that the prisoner was rightly tried at the Central Criminal Court.

Bovill, C.J.—There is no doubt that the place where the offence was committed was within the territory of France, and that **the prisoner** was therefore subject to the laws of France, which that nation might enforce if they thought fit; but at the same time he

was also within a British merchant vessel, on board that vessel as a part of the crew, and as such, he must be taken to have been under the protection of the British law, and also amenable to its provision. It is said that the prisoner was an American citizen, but he had embarked by his own consent on board a British ship and was at the time a portion of its crew. There are many observations to be found in various writers to shew that in some instances, though subject to American law as a citizen of America and to the law of France as being found within French territory, yet that he must also be considered as being within British jurisdiction as forming a part of the crew of a British vessel, upon the principle that **the jurisdiction of a country is preserved over its vessels, though they may be in ports or rivers belonging to another nation. . . .** When vessels go into a foreign port they must respect the laws of that nation to which the port belongs; but they must also respect the laws of the nation to which the vessel belongs. When our vessels go into foreign countries we have the right, even if we are not bound, to make such laws as to prevent disturbance in foreign ports, and it is the right of every nation which sends ships to foreign countries to make such laws and regulations. In the present case, if it were necessary to decide the question upon the Merchant Shipping Act, I should have no hesitation in saying that we have the power to legislate for those persons **who place themselves under allegiance to us by becoming a portion of a British crew,** and there would be no inconsistency in including foreigners in such legislation. What is the effect of the Merchant Shipping Act it is not necessary now to decide, and therefore I do not feel it necessary to enter into the question, for the common law of England, independently of the statute, is in my judgment sufficient to decide the case. Here the offence is committed on board a British vessel by one of her crew. If this offence had been committed upon the high seas, there could have been no doubt upon the question either on principle or authority, and the offence then would have been committed clearly within the jurisdiction of the Admiralty, and therefore the Central Criminal Court would have stood in the same position as if the offence had been committed within its jurisdiction on land. Then, is the case different because the offence was committed when

the vessel was lying in the Bordeaux river, in a broad part of it below all bridges, and at a point where the tide ebbs and flows, and where great ships lie and hover? What difference is there between such a place and the high sea? The cases that have been cited clearly shew that the Admiralty has jurisdiction in such a place; if so, the case stands precisely the same as if the offence had been committed upon the high seas. On the whole, I have come clearly to the conclusion that the prisoner is amenable to British law, and that the conviction is right.

R. v. LABOUCHERE

(1884).

12 Q. B. D. 320; 53 L. J. Q. B. 362.

A criminal information for libel can be granted only at the suit of persons who are in some public office or position, and not at the suit of private persons.

Lord Coleridge, C.J.—It is much too late to question the perfect legality of criminal informations. The 4 & 5 Wm. & Mary, c. 18, to which so much reference was made in the argument, is conclusive to shew their legality. It was a statute passed to correct the abuse of them, and to fix the conditions on which for the future they were to be allowed; the statute either assuming that the Court had power to allow them, or conferring that power if it did not exist. But two years before the passing of this statute their legality had been denied in the case of Mr. Prynne (*a*) by Sir Francis Winnington, who, in the course of a very learned argument, stated that Lord Hale himself had said that on argument they could not stand. Lord Holt decided however to the contrary, intimating that Lord Hale must have been speaking only against the abuse of them.

Without going through the list of cases since the days of Lord Holt it is certain that at times they have been granted by the Court under circumstances and for reasons which could hardly satisfy now the discretion of this Court. . . . But the general dissatisfaction with

(*a*) 5 Mod. 549.

this state of things led in the time of Lord Denman and Lord Campbell to a much stricter practice in this Court in the granting of these informations. I am quite aware that *R.* v. *Gregory*, (*b*) *R.* v. *Latimer*, (*c*) and a few cases of this sort occurred during this period of time; but there can be no doubt that the cases were rare, except where some person in a public or official position was attacked in relation to such position, or where the attack was of so cruel and outrageous a sort as to make it, according to the view of Hawkins, a matter which interested the public and called for interference of the Court as representing the public and charged with the defence of its interests.

So it was during the greater part of the time of Sir Alexander Cockburn; though towards the close of his life the practice of the Court became somewhat easier and laxer. I have, however, by the kindness of a learned friend been furnished with the reports of fifty cases of criminal information running over the years from 1860 to 1880 inclusive; and out of these fifty cases four only were cases of informations granted at the suit of persons who were not in some public office or position; and during that time there were repeated declarations by various members of the Court, not indeed that, as matter of law, the information would not be granted at the suit of private persons, but that the Court would, as a general rule, leave private persons to their private remedies. For example, in *R.* v. *Lord Winchlesea* in 1865, Blackburn, J., says, "**this remedy had usually and probably been confined to cases of magistrates, ministers, public officers, and persons in a high position whose character was of such public importance as to require immediate vindication.**" The Lord Chief Justice (Sir Alexander Cockburn) adds, that "**the extraordinary intervention by means of a criminal information was a procedure of a high prerogative character reserved for cases of public importance.**" . . . Again in 1877, in the matter of a gentleman named Middleton, in which the libel was very gross, the rule was refused, and I find Mellor, J., with the concurrence of Lush, J., saying this: "We must be chary of making the high jurisdiction of this Court a sort of substitute for the ordinary jurisdiction of the magistrates. The Court used to be far more strict in the exercise

(*b*) 8 A. & E. 907. (*c*) 15 Q. B. D. 1077.

of its extraordinary jurisdiction in granting criminal informations than it has been perhaps in later times; but this is hardly a case for its exercise. It is not like the case of a serious imputation on a magistrate, or public officer like, a town clerk for misconduct in his office." Again in 1878, in the case of an application on the part of the musical critic of the *Times* newspaper against the present defendant for imputing to the applicant personal corruption, the rule was refused by Mellor, J., and Hudleston, B., the court saying that "the libel was one which might well warrant an indictment or an action, but it did not follow that it was the fit subject of a criminal information. That was the exercise of the extraordinary jurisdiction of the Court which as a general rule was reserved for cases of libel upon persons in an official or judicial position, and filling some office or post which made it for the public interest necessary that such jurisdiction should be exercised for the refutation of the libellous charges made."

If we go back to principle, we find it well stated by Blackstone, Book IV, c. 23, p. 309: "The objects of the other species of informations filed by the master of the Crown Office upon the complaint or relation of a private subject are, *any gross and notorious misdemeanours, riots, batteries, libels, and other immoralities of an atrocious kind* not peculiarly tending to disturb the Government (for those are left to the care of the Attorney-General), but *which on account of their magnitude or pernicious example, deserve the most public animadversion.*" And if the passage in Starkie be looked at, in which he defends the proceeding by way of criminal information, which he calls "a proceeding irreconcileable with the ordinary principles of jurisprudence on which the law of libel in England is founded," it will appear at once that that great writer would have met the application before us with a summary refusal, and as not at all within those considerations which, in spite of the anomaly of the proceeding, bring about a result far more beneficial than might have been expected.

R. v. MILES

(1890).

24 Q. B. D. 423; 59 L. J. M. C. 56.

Miles was convicted before a Court of summary jurisdiction for an assault, and the Court being of opinion that the offence was of so trifling a character that it was inexpedient to inflict any other than a nominal punishment discharged him upon his giving security to be of good behaviour. Subsequently he was indicted for assault and battery upon an indictment the first four counts of which related to the same offence in respect of which the summary proceedings had been taken. *Held*, that he could not be convicted upon those counts of the indictment.

HAWKINS, J. (p. 430).—With regard to the common law defence relied on as an answer to this indictment, it is not strictly a plea of *autrefois convict* (except as to the fourth count, which charged a mere common assault), because the defendant had never previously been actually convicted of either of the offences in the form in which they are charged in the first three counts; but it was a defence grounded, as Blackburn, J., said in *Wemyss* v. *Hopkins*, (*a*) "on the well-established rule at common law that **whenever a person has been convicted and punished for an offence by a Court of competent jurisdiction transit in rem judicatum—that is, the conviction shall be a bar to all further proceedings for the same offence, and he shall not be punished again for the same matter; otherwise there might be two different punishments for the same offence.**" This rule of law so stated has never been doubted or qualified in any one of the numerous authorities which are to be found in the books upon the subject, though it has not always been found easy to apply the rule to the facts of particular cases under discussion. In the case cited (*Wemyss* v. *Hopkins*), where the appellant had been summarily convicted by justices under the Highway Act (5 & 6 Wm. IV, c. 50, s. 78) for an offence which, though charged as a mere offence against the Highway Act, amounted also to an assault in law, it was held that he could not afterwards be convicted upon the same facts of an assault under s. 42 of 24 & 25 Vict. c. 100. That was a case too clear to admit of a reasonable doubt, and is a good illustration of

(*a*) L. R. 10 Q. B. 378.

the general rule of law. The difficulties which have arisen in the application of the rule have most frequently occurred in cases where a conviction or acquittal for a simple offence has been set up as a bar to a subsequent charge against the same person in a more aggravated form, and the law, as deducible from the numerous cases to be found on the subject, seems to be this: that **where a criminal charge has been adjudicated upon by a Court having jurisdiction to hear and determine it, that adjudication, whether it takes the form of an acquittal or conviction, is final as to the matter so adjudicated upon, and may be pleaded in bar to any subsequent prosecution for the same offence, whether with or without circumstances of aggravation, and whether such circumstances of aggravation consist of the offence having been committed with malicious or wicked intent or by reason that the committal of the offence was followed by serious consequences.** In this respect the criminal law is in union with that which prevails in civil proceedings. Whoever heard of a new action prevailing after a verdict and judgment for damages for the same cause of action simply on the ground that the damages were insufficient, or that the conduct of the defendant was, since the verdict and judgment, discovered to be more malicious than it was deemed to be at the trial? Judgment recovered in a former action was always a good plea in bar. In *R.* v. *John Walker* (*b*) it was held by Coltman, J., that a conviction for an assault by wounding before justices was a bar to an indictment for the same assault and wounding with felonious intent to maim, disable, and do grievous bodily harm. In *R.* v. *Staunton* (*c*) the prisoner was indicted for wounding with intent to murder. He had previously been convicted and punished summarily for a common assault founded upon the same facts. The jury found the prisoner guilty of a common assault. In answer to a question of Erle, J., why the previous conviction had not been pleaded, it was said there was a difficulty in pleading a conviction for an assault to a charge of felony, whereupon that learned judge said that, in his opinion, the conviction would, if pleaded, have been an estoppel to the judgment for the *felonious* assault, and, though not pleaded, he treated the charge as having been adjudicated upon. Ten years later

(*b*) 2 M. & R. 446. (*c*) 5 Cox C. C. 324.

the same point was decided in *R.* v. *Elrington*, (*d*) where to an indictment for an assault and maliciously wounding and causing grievous bodily harm, etc., a plea that on the hearing of a charge for the same assault treated as a common assault before justices, they had dismissed the complaint, was held to be a bar. The true ground on which these decisions were based seems to me to be that the summary conviction or dismissal of the charges in each case operated as an absolute bar to any future proceedings for or in respect of the same assault; and as the aggravating circumstances, unless coupled with the assault, amounted to no crime, there was nothing to support the indictment. No doubt it seems a little startling that a conviction for a common assault accompanied by a shilling fine or a dismissal of the complaint as too trifling for any punishment, should afford an answer to a subsequent indictment for that same assault, upon conclusive evidence that it was accompanied by an intent to murder; but reason and good sense point out that, even at the risk of occasional miscarriages of justice, when once a criminal charge has been adjudicated upon by a Court having jurisdiction that adjudication ought to be final, and, after all, such miscarriages are very rare. No system of judicature can be suggested in which occasionally failure to insure complete justice may not arise. After the most solemn and careful trial of an indictment for murder, resulting in the acquittal of the person charged, it may happen that within a week the most cogent and conclusive proof of his guilt may come to light, or he may actually confess his crime. Yet his first acquittal is final. So with justices of the peace. After a summary conviction or dismissal of a charge upon which they have lawfully adjudicated, evidence may be discovered which would probably have induced them to come to an opposite conclusion. Yet, as in the case of an acquittal or conviction upon an indictment, their acquittal or conviction upon complaint within their jurisdiction is equally final, and their decisions upon matters within their jurisdiction cannot, as I have already shewn, be altered by presenting the same charge in the shape of an indictment before a jury in an aggravated form. But it is not every summary conviction or acquittal for a common assault which will operate as a bar to an indictment for

(*d*) 1 B. & S. 688.

an offence in which that assault was an element. It could hardly be contended that a previous conviction for a common assault could be pleaded in bar to an indictment for murder, though to prove the murder it might be essential to prove the assault adjudicated upon. For the offence of murder consists in the felonious killing. So also of manslaughter: *R.* v. *Morris.* (*e*) . . . It might be suggested that it may so happen that justices take a grievously erroneous view of the facts presented to them, and that, by convicting of a common assault when the facts point to a serious felony, justice may be defeated and a great criminal may escape the punishment due to his crime. True it is that it may so happen; so it may that a judge or jury may take an erroneous view of facts presented to them. For this there is no remedy.

R. v. MORRIS

(1867).

L. R. 1 C. C. R. 90; 36 L. J. M. C. 84.

Morris was convicted at petty sessions of an assault on Thomas Lymer and was sentenced to imprisonment. Subsequently Lymer died and Morris was indicted for manslaughter. *Held*, that the conviction for assault was neither at common law nor under s. 45 of the Offences against the Person Act, 1861, a bar to the indictment for manslaughter.

Byles, J.—I am of opinion that the prior conviction of the assault under the 24 & 25 Vict. c. 100, s. 45, affords no defence to the subsequent indictment for manslaughter, the death of the deceased having occurred after the conviction, but being a consequence of the assault. The form and the intention of the common law pleas of *autrefois convict* and *autrefois acquit* shew that they apply only where there has been a **former judicial decision on the same accusation in substance, and where the question in dispute has been already decided.** There has, in the present case, been no judicial decision on the same accusation; and the whole question now in dispute could not have been decided, for, at the time of the hearing before the magistrates, whether the assault would amount to culpable homicide or

(*e*) L. R. 1 C. C. R. 90.

not depended on the then future contingency whether it would cause death. The case of *R.* v. *Salir* (*a*) . . . if not precisely in point is nevertheless a strong authority for this view of the law. But reliance is placed on the words of the statute (24 & 25 Vict. c. 100, s. 45), "for the same cause." It is to be observed that **that statute does not say for the same act, but for the same cause.** The word "cause" may undoubtedly mean "act": but it is ambiguous; and it may also, and perhaps with greater propriety, be held to mean "cause for the accusation." **The cause for the present indictment comprehends more than the cause in the former summons before the magistrates,** for it comprehends the death of the party assaulted. It is, therefore, at least in one sense, not the same cause. But, if these observations on the meaning of the word "cause" as used in the statute should appear to savour too much of refinement, and to be used in support of a forced construction, it must be remembered that it is a sound rule to construe a statute in conformity with the common law, rather than against it, except where or so far as the statute is plainly intended to alter the course of the common law. An additional reason in this case for following the common law is the mischief which would result from a different construction . . . a murderer, for example, by suffering or obtaining a previous conviction for an assault, might escape the due punishment of his crime.

R. v. CASTRO

(1881).

6 A. C. 243; 50 L. J. Q. B. 497.

An indictment for perjury contained two counts charging perjury to have been committed by the defendant on two different occasions. *Held*, that both offences might be included in the same indictment and that a general verdict of guilty on the charges contained in both counts was good.

Lord Blackburn (p. 243).—I totally disagree that the pleadings at common law in a criminal case and a civil case were in the slightest degree different. I am speaking of course of the time before the Judicature Acts passed which swept them all away. Many

(*a*) *C. C. C. Ser. Pap.* vol. 46, p. 84.

enactments had from time to time been passed, relieving the strictness of pleadings in civil cases, which did not relieve them in criminal cases; but the rules of pleading at common law were exactly the same in each case. The course taken with regard to an indictment was this: The Queen having sent her commission to the grand jury, or any other commission to a proper tribunal, the tribunals so authorized presented all the offences that came to their knowledge; if it was brought sufficiently to their knowledge that a man had committed ten murders, fifty burglaries, and a score of larcenies they would find, not one finding as to them all, but they would find in separate counts that he had committed each of those charged offences; and if there were many other persons (as generally there are) it would also be found that those other persons had committed the offences proved against them also, and of this presentment one record was made up. Upon that, process could be issued against a man so charged, to bring him upon his trial before a petty jury, to try whether he was guilty of those offences so charged or not.

Now, at common law there was no objection whatever, in point of law, to bringing a man who was charged with several offences, if those charges were all felonies, or were all misdemeanours, before one petty jury, and making him answer for the whole at one time. The challenges and the incidents of trial are not the same in felony as in misdemeanour, and therefore felony and misdemeanour could not be tried together; but any number of felonies and any number of misdemeanours might. The contrary was asserted by the learned counsel, but, though repeatedly challenged to do so, he did not cite any authority in support of his contention. There was no legal objection to doing this; it was frequently not fair to do it, because it might embarrass a man in the trial if he was accused of several things at once, and frequently the mere fact of accusing him of several things was supposed to tend to increase the probability of his being found guilty, as it amounted to giving evidence of bad character against him. Whenever it would be unfair to a man to bring him to trial for several things at once, an application might be made to the *discretion* of the presiding Judge to say: "Try me only for one offence, or, try me only for two offences; if one was the real thing let me be tried for one and one only," and wherever it was

right that that should be done the judge would permit it. For these mixed motives it was well established by a long series of decisions, (I confess I doubt whether they were right at first, but certainly they have been both well established now and sanctioned by statute —that is quite clear,) that **where the several charges were of the nature of felony, the joining of two felonies in one count was so necessarily,** I may say, **unfair to the prisoner that the judge ought, upon an application being made to him, to put the prosecutor to his election** and send them to two trials. **It never was decided,** even in felony, **that,** if that application for the election was not made, **the joining of several felonies,** that is to say, the taking several felonies which had been found together, and trying those several felonies before one petty jury, was **wrong in point of law**; on the contrary, it was repeatedly held that it was right enough, although if the proper application had been made at the proper time, in a case of felony, the party prosecuting would have been put to his election or made to take one felony only, and not both at the same time. But in cases of **misdemeanour** it was by no means a matter of course that that should be done. I think that, if the judge, upon an application made to him had been satisfied that to try the man for several misdemeanours together would work injustice to the prisoner, he had a perfect right to say, "I will not work this injustice by trying them together, let us diminish them in number and try a reasonable number and no more." I do not know whether that was ever done in a case of misdemeanour, but I feel very little doubt that it may have been.

I think that in such a case as the American case (*Tweed* v. *Lipscombe*, 15 Sickel's New York A.C. 559), which was cited, where a man was called upon to answer before one jury at one time for 200 offences, the man might not unreasonably have said, "That is too much to put a man upon his trial for; select five or six, try me on those, let the rest stand over." I do not see that that would be at all an unreasonable application. And in the present case, if an application had been made to the Court of Queen's Bench to put the party to his election, and if it had been said, "I cannot be fairly tried for one offence of perjury committed in Middlesex, if at the same time I am to be tried for another perjury committed in London,

therefore there must be two separate trials" ; if such an application had been made the Judges of the Queen's Bench would doubtless have said, We will listen to the arguments that may be urged in its favour. What they could possibly have been I do not know, but no such application was made. The prisoner was tried upon the two counts before one petty jury. They were taken both together, and then the result was that he was found guilty upon both.

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